No. 260.
Brf. of Hoyt for D. C.

OFFICE SUPREME COURT
FILED
FEB 19 1900
JAMES H. McKENNEY

SUPREME COURT

Filed Feb. 19, 1900.

OF THE UNITED STATES.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
vs.
THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY,
Defendants in Error.

October Term, 1899.

No. 260.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Brief for Defendant in Error, The Cleveland Iron Mining Company.

GEO. HAYDEN, *Solicitor.*

J. H. HOYT, *of Counsel.*

THE FORMAN-BARRETT-HATCH CO., CLEVELAND O.

Supreme Court of the United States.

Case No. 17363.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY, Plaintiff in Error, vs. THE CLEVELAND IRON MINING COMPANY, AND THE LAKE SUPERIOR IRON COMPANY, Defendants in Error.	October Term, 1899, No. 260.

Brief for Defendant in Error, The Cleveland Iron Mining Company.

The so-called statement of facts contained in the brief of Solicitors for plaintiff in error contains the statement of but one fact properly set forth—the ownership of lands surrounding Lake Angeline. Beyond this it is at most an argument and a very partial one, in which partial statements are so confused with argument that the entire statement is impossible of use on which to present the case to this court. We therefore feel justified in fully stating the facts.

STATEMENT OF FACTS.

THE TERRITORY IN DISPUTE.

The land in dispute was formerly the bed of Lake Angeline and the three parties owned all the land surrounding the lake. The patent under which defendant, the Cleveland Iron Mining Co., claims was obtained from the government, July 21, 1850, and was recorded before patents for the lands of either of the others were issued or recorded.

The patent under which the Cleveland Company holds its title contained the following description:

"The east half of Section ten (10) and the west half of Section eleven (11) in Township forty-seven (47) N., of Range twenty-seven (27) W., containing 555 acres and 15-100 of an acre, according to the official plat, etc." The subsequent patents under which the other parties hold title to these lands lying upon the shore of this lake, describe the parcels as lots.

While mining operations had been carried on continuously by the respective companies on their respective lands for more than twenty years last past, no iron ore was known to exist in the bed of the lake or under its waters, until the winter of 1886-7, when Mr. D. H. Bacon, then agent of the Cleveland Company, by diamond drill borings conducted through the ice on the North side of the lake, discovered iron ore (R. pp. 186-188). This discovery is not within territory now claimed by complainant.

At the time of this discovery, Mr. Bacon was congratulated upon the find by the Superintendent of the complainant company, who expressed doubt that the ore there discovered extended "across the line into

their property." Mr. Kidder, agent of the complainant company, shortly afterwards, in discussing the discovery, "expressed the same fear." (R. p. 186).

No ore was at that time known to exist in that territory under or adjacent to the south line of the section where it crosses the southeast arm of the lake, the subsequent discovery and development of which in its various stages gave rise to the various acts, contracts, agreements and conduct of the parties shown in this record and finally to the suit itself. Ore was discovered South of the line by complainant in 1890.

In 1881, the Cleveland Company was assessed for taxes upon "the East half of Section ten (10)" and paid taxes upon that description. In 1895 it was assessed upon the "east half of Section ten (10)" and paid taxes upon that description. These are the only tax statements put in evidence and their force is uncontradicted by any other tax record or history.

EVIDENCE REGARDING ANCIENT CLAIMS OF POSSESSION OR OWNERSHIP

is somewhat meagre on both sides. Mr. Bacon testified that in the year 1880 or 1881 he visited the locality about the South quarter-post of Section ten in company with Mr. J. C. Morse, then the Cleveland Company's agent, for the purpose of making a general inspection of the company's property. At this time he was met by Mr. Kidder, then agent of the complainant company, who pointed out to Mr. Bacon that the Cleveland Company owned a small corner of land on the South line of the lake at the South quarter-post and also pointed out the South boundary line of the Cleveland Company's property running eastward across the Southeast arm of Lake Angeline and referred to that line where it

crosses the lake and extending eastward, as the Cleveland Company's South boundary line. (R. pp. 185, 186, 188.)

Mr. Bacon soon afterward became agent of the Cleveland Company and remained so until 1887 and during that time never heard of any claim made by complainant company that it owned any portion of the land North of the South line of ten in the bed of the lake. (R. p. 187.)

The testimony of Mr. Bacon is contradicted by Mr. Kidder, who testified that many years ago Mr. Morse came to him and asked him to sign some kind of a letter of recommendation that the Lake Angeline Company should quit claim to the Cleveland Company everything North of the South line of Section ten on condition that the Cleveland would deed to the Lake Angeline everything South of that line. (R. p. 108). He also denied all recollection of the conversation testified to by Mr. Bacon. (R. p. 109).

The President of the Cleveland Iron Mining Company at this time, Mr. Samuel L. Mather, who remained such down to the time of his death, died in 1890 or 1891 (R. p. 201).

In the year 1890, complainant company, believing there was iron ore of some kind a short distance South of the South line of Section ten under and adjacent to the Southeast arm of the lake, began sinking a shaft and struck ore of good quality in 1891.

Walters, R. p. 117.

Kidder, R. pp. 98-99.

After striking this ore complainant company ran several drifts upon it, to the westward, to the Southeast and to the Northwest in order to develop the extent of it.

The location of this shaft and direction of it, also the direction of the several drifts running therefrom and as they have subsequently been continued to the date of the hearing, are shown upon maps "F" and "G."

It was not until the summer of 1892 that Mr. Kidder and Mr. Walters discovered that the ore body found by them in the bed of the lake in this Southeast arm would very likely continue Northwest and go over the South line of Section ten into the territory North of it in the locality where the line crosses the Southeast arm of Lake Angeline.

Kidder, R. pp. 98, 105.

Walters, p. 133.

The maps "F" and "G" will show that the shaft of complainant company mentioned above was run to the Southwest and that many of the drifts are run a long way towards the Southeast and towards the West and Northwest a considerable distance South of the South line of Section ten. These maps do not, of course, show the condition of things in the summer of 1892 when the development work by complainant company had practically but just begun and when the discovery was first made by Kidder and Walters that their ore body probably would go over the line.

The discovery of iron ore of a good quality such as that discovered by complainant by means of the "east end" shaft was very important to complainant. A mine theretofore unsuspected had been discovered upon which great hopes might be built of future value. The existence of that ore was known in 1890 or in 1889. It was found to be of considerable extent in the year 1891 in a location under the waters of the Southeast arm of the lake. For the first time complainant company was confronted with the important question

what effect the waters of the lake would have upon the mine. With the certainty of an iron mine under the waters of the lake near the South line of Section ten complainant was confronted with the necessity of settling the question whether the doctrine of riparian rights should be left open to the Cleveland Company upon which it might claim a portion of the lake bed South of the Section line opposite to its lot seven.

In March, 1892, the pumping contract was formulated between the three companies. That pumping contract was necessarily preceded by a negotiation by which its terms were agreed to before the draft was made, but the negotiation appears in evidence only in detached incidents. These consist for the most part of (1) Exhibits 2 and 3 (R. pp. 174-175) the first being a request signed by Thomas Walters, directed to Mr. Mills asking him to sign a certain agreement, and also the agreement itself which was enclosed, both dated March 2, 1892: (2) the testimony of Kidder and Mills as to what consideration led to the division of the expense of pumping the lake as between the complainant company and the defendants. These exhibits are set forth at length hereafter.

The testimony of Mr. Kidder and Mr. Mills regarding the division of expense as affecting their respective boundaries will be referred to among the facts pertaining particularly to the pumping contract. The special attention of the court is asked, however, to the fact that the pumping contract, dated March 17th, 1892, executed by the Cleveland Company on the same day (R. pp. 88-93) and preceded by one day by the petition of the three companies to the Common Council of the city of Ispheming for consent to pump the lake (R. p. 178) preceded by several months the dis-

covery made by Kidder and Walters in the summer of 1892 above referred to, that the ore found by them South of the line would probably extend over that line to the North.

THE PUMPING CONTRACT.

The complainant's bill sets up the pumping contract (R. p. 10). The contract is not, however, set forth in terms but is merely referred to.

At the hearing, complainant's counsel offered that contract in evidence and it is marked as complainant's Exhibit "I" (R. p. 88 to 93).

Mr. Kidder, prior to the making of that contract, was anxious to get rid of the water in the Southeast arm of the lake. Portions of the negotiations were carried on between Mills, Kidder and Mr. Mather, President of the Cleveland Company. Who conducted the negotiations in behalf of the Lake Superior Iron Company does not appear. The letter of James Laughlin, Jr., President of the complainant company, dated Aug. 18, 1893, and appearing as defendant's Exhibit 12 (p. 181) indicates that the president of complainant company himself conducted negotiations in behalf of his company with the other two companies.

The important circumstances involved in that contract necessarily presuppose considerable negotiation between the heads of the various companies before these terms were finally settled upon, and *that an agreement was had between them.*

In the order of time, the first writing found in the evidence leading to that contract is Exhibit 3, sent by Superintendent Walters to Agent Mills enclosed in Exhibit 2, both of which are here given in full:

DEFENDANT'S EXHIBIT 2.

Ishpeming, Mich., March 2, 1892.

F. P. Mills, Esq.

Dear Sir:—Enclosed herewith find two copies of agreement. Will you kindly sign and return one, and oblige.

THOS. WALTERS.

DEFENDANT'S EXHIBIT 3.

Ishpeming, Mich., March 2, 1892.

Cleveland Iron Mining Co., Ishpeming, Mich.

Gentlemen:—Providing you close by March 15th, 1892, a contract with B. C. Howell, to drain Lake Angeline for $33,000 in full, and only on completion of the work, we will pay you one-fifth (1-5) of such cost, less one-fifth (1-5) the then estimated value of such plant as becomes yours at that time.

We also, by reason of not entering a joint contract to keep the lake bed empty, agree that we will construct a flume to take away all drainage from our side of the section line, and maintain it until the ore on such land, situated under the lake bed, is exhausted. After that you may take the flume without charge, and care for it as you see proper.

Yours truly,

PITTSBURGH & LAKE ANGELINE IRON CO.,

By Thos. Walters, Supt.

Conditions accepted.

CLEVELAND IRON MINING COMPANY,

By F. P. Mills, Agt.

Following this the three companies requested permission of the city of Ishpeming to pump Lake Angeline. The lake lies within the city limits and all

the parties must have understood that the city had a right to grant or refuse permission to pump this lake; that the reasons for draining so large a body of water were of some consequence to the city as well as to the parties interested.

The records of the city of Ishpeming comprising the original petition signed by officers of the three companies and the action of the Common Council of the city thereon appear in defendant's exhibit 11 (R. p. 178) and are as follows:

DEFENDANT'S EXHIBIT 11.

March 16th, 1892.

A regular meeting of the Common Council of the city of Ishpeming, Michigan, held in the council chamber on Wednesday evening, March 16th, A. D. 1892.

Meeting called to order at 7:30 p. m. by Mayor Donahoe.

There were present Mayor Donahoe, Aldermen Routhier, Eggan, Johnston, Jones, Fitzpatrick, McNamara, Samuelson, Beerling, Swanson, Persons and Buzzo. Absent—Aldermen Malloy and Anderson.

Alderman Jones introduced the following ordinance:

AN ORDINANCE

Granting permission to THE CLEVELAND IRON MINING COMPANY, THE LAKE SUPERIOR IRON COMPANY and THE PITTSBURGH & LAKE ANGELINE IRON COMPANY to pump out and permanently drain Lake Angeline.

Whereas, The Cleveland Iron Mining Company, The Lake Superior Iron Company, and The Pittsburgh

& Lake Angeline Iron Company by mesne conveyances from the original patentees of the United States, severally own all the land surrounding Lake Angeline which said lake is situated within the corporate limits of the city of Ishpeming, and therefore, exclusively, severally own the bed of said lake, as follows, to-wit: The said The Cleveland Iron Mining Company all that portion of the bed of said lake lying east of the center line of section ten (10) as projected through said lake and north of the south line of section ten (10) and section eleven (11), township forty-seven (47) north of Range twenty-seven (27) west, as so projected: The Lake Superior Iron Company, all that portion of the bed of said lake lying west of center line of said section ten (10) and north of the south line of section ten (10) as projected through said lake: The Pittsburgh & Lake Angeline Iron Company all that portion of the bed of said lake lying south of the south line of said section ten (10) as projected through said lake and the surface right of lot six (6) of said section ten (10) as acquired by them from The Lake Superior Iron Company.

And Whereas, the said three companies desire to pump the water out of said lake, and to permanently drain the same, in order to severally conduct mining operations on the respective portions of said lake bed belonging to each, and desire the formal permission and authority of the Common Council of the city of Ishpeming so to do, said lake lying and being within the corporate limits of said city:

Therefore, be it ordained by the Common Council of the city of Ishpeming.

Section First. That consent, permission and authority are hereby given and granted and duly

vested in the said The Cleveland Iron Mining Company, the said The Lake Superior Iron Company, the said The Pittsburgh & Lake Angeline Iron Company and their respective successors and assigns, to pump out and drain away the water of the said Lake Angeline and, thereafter, to permanently drain the same and to maintain and operate the necessary machinery and pumping apparatus and appliances so to do, provided that the water pumped out of said lake and permanently drained therefrom shall be carried away through the present outlet of said lake into Carp River.

Section Second. This ordinance shall take effect from and after the passage thereof.

Section Third. All ordinances or parts of ordinances or resolutions heretofore made or ordained or passed which are inconsistent with the provisions of this ordinance, are hereby repealed.

Approved by the Common Council of the city of Ishpeming on March 16, 1892.

T. F. DONAHOE, Mayor.
A. SANDBERG, Recorder.
March 16, 1892.

To His Honor, the Mayor, and the Common Council of the city of Ishpeming, Mich:

We do ask your honorable body to pass favorably the above ordinance.

CLEVELAND IRON MINING COMPANY,
By F. P. Mills, Agt.
LAKE SUPERIOR IRON COMPANY,
By C. H. Hall, Agt.
P. & L. A. I. Co.
Thos Walters, Supt.

Alderman Routhier moved the adoption of the foregoing ordinance. Supported by Alderman Eggan, the vote by yeas and nays were as follows:

Yeas—Mayor Donahoe, Alderman Routhier, Eggan, Johnston, Jones, Fitzpatrick, McNamara, Samuelson, Beerling, Swanson, Persons and Buzzo.

Nays—None.

The motion was then declared unanimously carried.

A. SANDBERG, Recorder.

That the language of this petition has been formulated as a part of the agreement is evident not only from the considerations mentioned, the important consequences involved, but by the fact that the pumping agreement is dated on the day following the passage of this resolution and on the same day is executed by the Cleveland Iron Mining Company at Cleveland, Ohio.

The pumping contract is as follows (R. pp. 88-93):

This Agreement, made this 17th day of March, A. D., 1892, by and between The Cleveland Iron Mining Company, first party, The Lake Superior Iron Company, second party, and The Pittsburgh & Lake Angeline Iron Company, third party, all corporations organized under the laws of the State of Michigan.

WITNESSETH:

First—That whereas, the three parties to this agreement severally own all the land surrounding Lake Angeline, in the County of Marquette, State of Michgan, and, iron ore having been discovered under the bed of said lake, it has become necessary to pump out the water of said lake, and permanently thereafter drain the bed thereof, in order that each of the parties hereto

may economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to.

Second—And, whereas, one B. C. Howell, prior to the date of this contract had a large pump suitable for such work and proposed to said first party to contract to pump out said lake and to sell said pump and necessary appliances, all for the sum of thirty-three thousand dollars ($33,000) provided he could begin operations immediately while firm ice remained in said lake, so as to furnish the necessary support for placing the proper timber work in position: and whereas, said first party after communicating with said second and third parties and getting their approval, has entered into a contract with the said Howell to pump out the water of said lake and to purchase said pumping apparatus and appliances for said sum, thus making a large saving in the cost thereof, and, whereas the cost of the continuous drainage of the bed of said lake, after the water thereof is pumped out, is now impossible of ascertainment, and the parties hereto are desirous of fixing the proper proportion of expense, both of the purchase of said pumping apparatus and of said pumping out of said lake and of the cost of the continuous or permanent drainage of the bed thereafter, to be borne by each, the same being for the mutual benefit of all.

Now, therefore, the parties hereto, in consideration of the premises and mutual considerations received by each from each, the receipt of which is hereby respectively acknowledged, hereby agree as follows:

SAID FIRST PARTY AGREES:

First—To bear and pay eight-fifteenths (8-15) of

the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake, under the arrangement with the said Howell, to-wit: the sum of seventeen thousand, six hundred dollars ($17,600) and eight-fifteenths (8-15) of any additional cost which may be necessarily incurred in the premises, and will also bear and pay one-fifth (1-5) of the value of said pump and appliances, after the lake is pumped out, which one-fifth (1-5) thereof is to be deducted, as hereinafter provided, from the amount to be paid by said third party.

Second—After said lake is once pumped out by said Howell, to maintain and operate the said pumping apparatus and plant for the continuous and permanent drainage of the bed of said lake, advancing all necessary expenses for such maintainment, operation and repairs, and, at the end of each calendar year, to pay and bear such a proportion of the cost thereof during the year preceding, as the total number of tons of ore mined and produced by said first party from that portion of the said lake bed belonging to it, during said year, bears to the total number of tons of iron produced and mined during such year by said first and second parties jointly from the bed of said lake, and further, to bear and pay two-thirds (2-3) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

SAID SECOND PARTY AGREES:

First—To bear and pay four-fifteenth (4-15) of the entire cost of the purchase of said pump and apparatus, and of the pumping out of said lake under the arrangement with the said Howell, to-wit: the sum of eight thousand eight hundred dollars, ($8,800), and four-

fifteenths (4-15) of any additional cost which may be necessarily incurred in the premises.

Second—To bear and pay to said first party, on settlement to be made at the end of each calendar year, such a proportion of the entire cost of maintaining, operating and repairing the plant for the permanent drainage of said lake-bed as the total number of tons of iron ore produced and mined by said second party, from that portion of the lake-bed owned by it, during such year, bears to the total number of tons of iron ore produced and mined by said first party and said second party from the entire lake-bed during such year, and also to bear and pay one-third (1-3) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

SAID THIRD PARTY AGREES:

First—To bear and pay three-fifteenth (3-15) of the entire cost of the account to be paid to the said Howell under the arrangement of said first party with him, to-wit: three-fifteenths (3-15) of the said thirty-three thousand dollars ($33,000) namely, the sum of six thousand six hundred dollars ($6,600), and three-fifteenths (3-15) of any additional cost which may be necessarily incurred in the premises, less one-fifth (1-5) of the value of said pump and appliances purchased from the said Howell under the arrangement with him, the value of which is to be estimated as soon as the first drainage of said lake is completed.

Second—To erect and maintain a proper and sufficient flume, so constructed above the present water level of Lake Angeline, as to divert and carry away all the surface water or other surface drainage which would otherwise come into the present bed of said lake

from all the land lying above the present water level of said lake, and south of the south line of section ten (10) as projected through said lake, and also to run into said flume any and all water which the said third party may pump from its mine or mines; which said flume said third party agrees to maintain and keep in repair and in successful operation, diverting such drainage from the bed of said lake, until the iron ore to which said third party is entitled, lying on, in, or under the portion of the bed of said lake lying south of said south line of said section is mined and exhausted, and then, to turn over said flume in good repair to the said first and second parties hereto without charge, and to allow them, thereafter, to operate and maintain the same for the purpose of continuing said drainage, giving the employees of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, allowing them to make such alterations in said flume, and in the direction of the same, as may be necessary to successfully accomplish such drainage.

IT IS MUTUALLY AGREED, BY AND BETWEEN THE PARTIES HERETO:

First—That each of the parties hereto will respectively pay on demand, their proper proportion of the amounts due from each, as aforesaid, under the arrangement with the said Howell, when and as called for by W. G. Mather, of Cleveland, Ohio, who is hereby appointed the trustee of all the parties to this agreement to collect the amount due from each, and to pay the same to said Howell in accordaace with the terms of his contract.

Second—That, in case of any dispute arising be-

tween the parties hereto, either under this contract or in regard to their joint operations in or about the drainage of the bed of said lake, all such matters of dispute shall be settled by five (5) arbitrators, one (1) to be chosen by each of the parties hereto and the other two (2) to be selected by the arbitrators so chosen, an award in writing of any three (3) of said arbitrators to be binding and final upon the parties hereto. In case of a dispute, however, between two (2) only of the parties to this agreement, but three (3) arbitrators shall be chosen, one (1) by each of said disputing parties, and the other by the two (2) so chosen, and the award in writing of any two so chosen shall be binding and final upon the parties between whom such dispute has arisen.

Any party to this agreement desiring such arbitration shall have the right to the appointment of arbitrators in the manner above provided, by serving a ten days' written notice of its intention to so arbitrate on the other party or parties to this agreement, who shall each respectively within the time limited in such notice, select its arbitrators, and, in the event of its failure so to do, then the party desiring said arbitration shall have the right to select an arbitrator in lieu of the one or ones failed to be appointed by the other party or parties, and an award in writing of a majority of the arbitrators so chosen shall be final and binding upon the parties to such arbitration.

Third—This agreement shall extend to and be binding upon the successors, assigns and grantees of the respective parties hereto, precisely as if said respective successors, assigns and grantees had been specially designated herein.

It is mutually agreed by and between the first and second parties hereto as follows:

First—That the said first party, through its proper agent or employes shall keep an accurate and exact account of the cost of operating and maintaining said pumping plant and appliances for the permanent drainage of the bed of said lake, which accounts shall, at all reasonable times be open to the inspection of the said second party through its agents or employes, and that, before any improvement or other machinery or appliances are purchased for the purpose of the permanent drainage of said lake, the second party shall be consulted concerning the purpose thereof, and its approval obtained; and on or before the tenth day of January of each calendar year, a written statement of the cost of maintaining and operating said drainage plant and appliances for the preceding year, shall be sent to said second party by the first party, together with a full, complete and accurate statement of the total number of tons of iron ore mined during the preceding year from the bed of Lake Angeline by said first party, and, on or before the said tenth day of January of each such year, the said second party shall send to the said first party, a full, complete and accurate statement of the number of tons of iron ore mined or produced by said second party from the bed of Lake Angeline during the year preceding.

And the said second party agrees, within ten days from the receipt by it of said account, to pay to the said first party its proper proportion of the cost of maintaining and operating said permanent pumping and drainage plant, as above provided, and also, on demand, one-third (1-3) of the cost of such other and additional appliances and apparatus as may have been

previously agreed on by the first and second parties hereto as above provided. Provided, however, that if, when said accounts for the permanent drainage during any year are rendered to said second party, said second party is willing, for the succeeding year, to undertake the permanent drainage of said Lake Angeline, at a less cost than that procured by the said first party for the year last preceding, the said second party shall thereupon have the right, during the succeeding year, to take possession of said permanent pumping and drainage plant, together with all appliances and operate and maintain the same itself, permanently draining the said lake bed during such year advancing all the cost thereof, in which event the said second party shall keep and render the accounts above required to be kept by the said first party, and the said first party, within the time above limited, after the expiration of any such year, shall pay to the second party its proportion of the cost of such permanent drainage, in the manner and within the time above provided, and if, at the end of any such year, the said first party is willing to undertake the permanent drainage of said lake for the next succeeding year, at a cost less than that incurred by the said second party, it shall have the right to do so, as above provided, it being understood that either, at the end of any year, shall have the right to operate said permanent drainage plant for the next succeeding year, provided it is willing to guarantee to do so at a less cost than that incurred by the other party during the year next preceding.

If desired by either said first or said second party, the respective statements of the amount of ore respectively mined and produced by each in each year from the respective portions of the bed of Lake Angeline

owned by each party, shall be under oath and sworn to by the agent or employes of each party having knowledge of the facts.

In witness whereof, the parties hereto have caused these presents to be duly executed in triplicate, by their respective officers, and their respective corporate seals to be attached, as of the day and year first above written.

THE CLEVELAND IRON MINING COMPANY,
By Wm. G. Mather, President.

(Corporate seal.)

Attest: Fred A. Morse, Secretary.

Signed, sealed and delivered in presence of L. G. Madison, Frank B. White.

THE LAKE SUPERIOR IRON COMPANY,
By G. W. R. Matteson, President.

(Corporate seal.)

Attest: A. C. Tenney, Secretary.

W. B. Bosson, Chas. Hall Adams..

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY. By Jas. Laughlin, Jr., President.

(Corporate seal.)

Attest: W. G. Pollock, Secretary.

W. C. Quinn, William F. Robb, A. C. Dustin, C. A. Judson.

STATE OF OHIO, } ss.
Cuyahoga County, }

Before me, Alton C. Dustin, a commissioner of deeds, for State of Michigan, residing in the City of Cleveland, County of Cuyahoga, and State of Ohio, personally appeared Wm. G. Mather, President, and Fred A. Morse, Secretary of the Cleveland Iron Mining

Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they duly executed the foregoing instrument, for and on behalf of said corporation duly authorized thereto, and that the same is the free act and deed of said corporation, and the free act and deed of themselves as such officers.

In witness whereof, I have hereunto set my hand and official seal, this 17th day of March, 1892.

(Seal.) ALTON C. DUSTIN,
Commissioner of Deeds for Michigan,
Residing in Cleveland, Ohio.

STATE OF MASSACHUSETTS, } ss.
County of Suffolk. }

Before me, Charles Hall Adams, a commissioner of deeds for the State of Michigan, residing in the City of Boston, County of Suffolk, and State of Massachusetts, personally appeared G. W. R. Matteson, President, and A. C. Tenney, Secretary of the Lake Superior Iron Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of such corporation, and the free act and deed of themselves as such officers.

In witness whereof, I have hereunto set my hand and official seal, this sixth day of July, A. D., 1892.

(Seal.) CHAS. HALL ADAMS,
Commissioner of Deeds for Michigan,
Residing in Boston, Mass.

STATE OF PENNSYLVANIA, }
Allegheny County. } ss.

Before me, William F. Robb, a commissioner of deeds for the State of Michigan, residing in the city of Pittsburg, County of Allegheny, and State of Pennsylvania, personally appeared James Laughlin, Jr., President of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such President, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such President.

In witness whereof, I have hereunto set my hand and official seal, this twentieth day of August, A. D., 1892.

(Seal.) WILLIAM F. ROBB,
Commisioner of Deeds for Michigan,
Residing in Pittsburg, Pa.

STATE OF OHIO, }
Cuyahoga County, } ss.

Before me, Alton C. Dustin, a commissioner of deeds for the State of Michigan, residing in the city of Cleveland, County of Cuyahoga, and State of Ohio, personally appeared Wm. G. Pollock, Secretary of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such Secretary, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such Secretary.

In witness whereof, I have hereunto set my hand and official seal, this twenty-second day of August, A. D., 1892.

(Seal.) ALTON C. DUSTIN,
Commissioner of Deeds for Michigan,
Residing in Cleveland, Ohio.

Immediately following the making of this contract and in pursuance with the recitals in the preliminary portion thereof, the contract was made with B. C. Howell to pump the lake in consideration of the sum of thirty-three thousand dollars ($33,000). That contract appears as defendant's exhibit 4 on p. 230. It is dated on the very same day as the contract between the three companies.

Pursuant to these contracts the water of this considerable lake was all pumped out between March 17, 1892, and December 24, 1892. (R. p. 175, defendants' exhibit 5). The cost of pumping divided between the three companies ran above the original price of thirty-three thousand dollars by reason of other circumstances, the very large proportion of the increase falling solely upon the two defendants.

The total cost of drainage, both that chargeable under the Howell contract to the three companies and that paid only by the two companies upon the annual account divided between them to keep the lake permanently drained was seventy-six thousand four hundred and eighty-eight dollars and thirty-eight cents ($76,488.38), up to January 1, 1897. Of this large sum the Cleveland Company paid $44,149.68; the Lake Superior Iron Company, $17,147.18; and the Pittsburgh & Lake Angeline Iron Company, $7,601.38, with an additional unapportioned sum of $7,590.14, to be paid by the two

defendants alone on account of continued drainage. (R. p. 220.)

The situation referred to the comparatively shallow depth of water in the southeast arm, the slope from the mouth of this arm downward to the bed of the lake and the fact that water flowing into the main body of the lake bed from the southeast arm would reach every part of the bed, and the conditions upon which the complainant company stipulated for paying but a small part of the first pumping cost and obtained immunity from all cost of continuous drainage is best shown by the following exhibits:

(1) The hydrographic map, defendants' exhibit 38. (R. p. 228).

(2) The petition to the Common Council, Exhibit No. 11. (R. p. 178).

(3) Defendants' exhibit three.

(4) The letter of the president of complainant company, dated August 18, 1893; disclaiming any interest in the lake bed.

(5) Defendant's exhibit 8a, inserted in the record at page 229.

(6) Defendant's exhibit 28. A large map on the scale of 50 feet to the inch, showing the depth of water in the southeast arm and the growing depth of water from the mouth toward the center of the lake. (R. p. 218).

The southeast arm of the lake contains shallow water, but the higher ground in this part of the bed fell rapidly away from the mouth of this arm toward the center of the lake, so that if the waters were lowered in the lake sufficiently to drain the southeast arm, there might still be many feet of water in the deeper portions of the lake bed.

A cross section of the lake on the north and south center line of 10 (Defendants' exhibit "8a"); (R. p. 229) a photograph of this arm to its mouth, showing across the mouth a trestle bridge, (Defendants' exhibit 25); (R. p. 216), and a photograph of the bed of the lake looking east, (Defendants' exhibit 5a) (R. p. 276), these are confirmatory of the hydrographic map and cross section on the north and south line of 10, and show that the downward slope of the lake bed from the mouth of the southeast arm to the deepest portion of the lake bed, is gradual, continuous and unobstructed, so that a pump located at the deepest portion of the lake at the commencement would drain not only the southeast arm, but every other portion of the lake.

The lake was fed, not only by springs in its bottom, but by two streams, one entering through the eastern arm, and the other through the southeast arm, over complainant's territory; these streams are shown to best advantage in defendants' exhibit 28. Rec. p. 218.

The most casual survey of the situation will show that with the southeast arm drained, and with the water which might enter deeper portions of the lake bed through this arm from the stream, beyond taken care of and turned from the lake bed, the arm itself would be freed from water, unless the lake bed should be permitted to fill with water and overflow into the arm. (See Mills R. p. 194).

Ownerships of the land having been assumed as they were in all these communications and in the pumping contract, nothing could be clearer than that complainant company performed its full duty by the other owners in assisting in the first drainage and thereafter taking care of the water entering the lake bed from its own territory, south of that boundary line.

This continuous pumping, even after that lake bed had been pumped dry by Howell, became, and now is, as was evidently foreseen at the time of making the pumping contract, a great burden upon the two defendants owning the territory comprised in that lake bed north of the south line of 10.

Though the Howell contract was performed near the end of 1892, the continuous pumping at the sole cost of the two defendants has continued without interruption since that time, costing the two defendants the following annual sums: from August 1st, to December 31st, 1893, $977.82; from January 1st to December 31st, 1894, $7570.58; from January 1st to December 31st, 1895, $4306.09; January 1st to December 1st, 1896, $3763.12.

An expense to get the mud out of the bottom of the lake after the water was pumped out was incurred by the two defendants, of $20,227.53. (R. pp. 136-137 138-139.)

This pumping, to keep the lake bed dry, is still going on at the sole expense of the two defendants, and is not only necessary to prevent the water rising in the lake high enough to enter the southeast arm, but also to prevent the workings of the Cleveland Company from filling with water through openings which since the lake was pumped dry, have been made through the surface. (R. p. 138.)

Stipulations of the pumping contract, of which the petition to the Common Council of the city of Ishpeming may well be a part, and defendants exhibit 3, (R. p. 175); taken in connection with the hydrography of the lake itself, are conclusive evidence without resort to oral explanation of the fact that the proportions of expenditure by the several companies; the im-

munity given the complainant company from continuous pumping; the stipulations of the two defendants, by which they are bound to complainant company at their own sole cost and expense to keep that lake bed forever dry, and by which also, each is bound to the other to keep that lake bed dry, are based upon the ownership explicitly recognized and defined in the pumping contract by which complainant's north line terminates with, and is bound by the south line of section 10. On no other theory would it be possible that complainant company had no interest in keeping the deeper portions of the lake bed extending towards its center, beyond the mouth of the southeast arm continuously pumped.

Mr. Kidder, in his testimony, undertook to claim that a fold or ridge of diorite rock through the center of the lake affected or controlled the apportionment of the original cost of pumping, and should afford complainant company immunity from continuous pumping thereafter, as fixed in the contract.

This testimony of Mr. Kidder, in the first place, is inadmissible as an effort to contradict the terms of the written contract.

But even if admissible, the testimony is made ridiculous by the hydrography of the lake and the contour of this lake bed. But the seal of discredit is finally put upon the claim by Mr. Kidder's own testimony on cross-examination:

"Q. (By Mr. Hanchette.) When you made this pumping contract, you then understood and acted upon the understanding also, that your premises stopped with the north section line of section 10? A. Yes. Q. The terms of the contract were finally settled in view of that opinion which you held in re-

gard to your property rights? A. That is right." (R. p. 103.)

The pump now used by the defendant companies in carrying out their annual burden under the contract keeping the lake bed dry, is now actually located at a point in the lake bed, nearly opposite the mouth of the southeast arm and nearly, if not quite, within the dotted lines reaching out into the center of the lake shown on the map, exhibit "A" (Rec. p. 14) attached to the bill of complaint, which includes the territory sued for by complainant; Joplin R. p. 206 top, 217 and map exhibit 28 (R. p. 218) containing the land marks referred to by the witness.

The conformation of the lake bed to that point from the mouth of the southeast arm is a continuous slope downward, and complainant is suing in this case for territory, the preservation of which from encroachment of water and mud it refused to take part in, on the ground that it had no interest therein.

Should the continuous pumping provided for in the pumping contract be suspended, the lake would refill with this result: it would destroy the mine of the defendant Cleveland Company in the lake bed, both on the north and south side of the lake.

ACTS OF THE PARTIES SUBSEQUENT TO THE PUMPING CONTRACT.

The pumping of the lake, the expenditures thereon, the breaking through of the surface of the mines of the Cleveland Company under the dry lake bed and the physical conditions involved in the pumping contract directly, have been referred to.

Attention has also been called to the fact that some months after the three companies had agreed to

the terms of the pumping contract, and after pumping of water pursuant thereto had been begun by Howell, the complainant company, through Mr. Kidder and Mr. Walters, became aware of the fact that the mine discovered by them in the southeast arm of the lake was tending to the northwest in such a manner that the deposit was likely to extend upon the Cleveland Company's side of section line.

Mr. Kidder and Mr. Walters called the attention of Mr. Mills, agent of the Cleveland Company, to this fact, and the Cleveland Company which had already begun a drill hole from its north side mine southward, to reach the territory adjacent to the south line, where this deposit might be found, obtained permission from the complainant company to enter the mine of the complainant south of the line, and run drill holes northward into its own territory. (R. p. 133.)

Five drill holes were thus bored by the Cleveland Company to this end, and ore found on the north side of the line. These borings are shown on map 28. (R. p. 218.) Five drill holes were also put down from the surface.

At a latter date the Cleveland Company, in the year 1894, commenced running a drift at great expense from the north side to reach this probable deposit on the south side for the purpose of determining whether it had any value. (R. p. 192.)

While the existence of ore had been found in this locality by the numerous borings, the real value of the deposit could not by such means be determined. To determine the value it was necessary to run drifts and cross-cuts after reaching the ore body, and this latter work was very expensive. (R. pp. 192-193.) The complainant company itself, after its borings, previous to

1890, to determine the existence of ore in the southeast arm, had sunk a shaft to reach the ore and had drifted therein before it was able to determine whether ore actually found was of sufficient extent to warrant opening a mine. (R. p. 121-122.)

At the time the Cleveland Company began its drift, Mr. Walters, in conversation with Mr. Mills on the probable value of so expensive a proceeding to the Cleveland Company, suggested to Mr. Mills that though the ore ran over the line into Cleveland Company territory, there could not possibly be enough of it to pay for so expensive a development, as the long sock drift proposed—that there would not be over 200,000 tons, and proposed that the Cleveland Company let complainant company have that ore which could be cheaply taken out to the south through the opening made by the latter south of the line, the latter to pay royalty thereon. (R. pp. 133-134.) It thus appeared that even as late as 1893, at the time of this conversation, the officers of complainant company did not suppose the ore body existing in large quantities south of the line was of any considerable extent north of the line. THERE WAS NOT ENOUGH TO COVET.

From the very time in 1892, when the borings by the Cleveland Company were commenced to test this south side territory down to September, 1896, but two months before this suit was commenced, the engineers and superintendents of the complainant and the Cleveland Company, respectively, made numerous maps of their respective operations on each side of the south section line of 10, and that section line was marked on all their maps as a boundary line. (See Exhibits G and H.) Map at p. 195, Map Ex. 30, R. p. 219, Ex. 21, p. 61. Such maps were frequently made and exchanged

with the other company by each company, so that each could keep track of the other.

In 1894 the workmen of complainant company in mining south of the boundary line unwittingly crossed the line and took ore from the north side near meander corner 16. On discovery thereof by Mr. Kidder he caused a map to be made and wrote to Mr. Mills of the Cleveland Company acknowledging the trespass, its locality and extent, and signifying his willingness to settle for it. A map of the trespass was also made by Mr. Jopling from the data furnished by Mr. Kidder and from Mr. Kidder's letter and measurements and the map showing the boundary line and location of the trespass, a settlement was had between them (R. p. 181; maps exhibit 15, p. 59; letters of Kidder and Mills p. 181).

On January 30th, 1896, Mr. Mills discovered a trespass committed by his people across the same boundary line into the premises of complainant company under the same lake bed and in nearly the same locality as the trespass of 1894. He informed Mr. Kidder of this trespass and furnished him maps showing the locality of the same as short distance west of the trespass of 1894. (R. p. 194; letter of Mills exhibit No. 20, p. 184; Maps Ex. Nos. 22, p. 194).

Defendants exhibit 28 (R. p. 218) shows the relative location of both these trespasses. Some time following this latter trespass and the month, probably, of February, 1896, Mr Kidder and Mr. Mills, and perhaps other officers of the respective companies visited the locality under this boundary line and again fixed nails in the timber structure to further mark the boundary line. (Mills p. 194). Bradt 64.

In the summer of 1896 complainant company

wishing a permanent lease of a right of way for a railroad north of the section boundary line furnished maps of a survey of that line to the officers of the Cleveland Company for the purpose mentioned. (R. pp. 207-208 maps at pp. 219-195-219).

The railroad track in question had been built in the winter of 1895-6 under oral permission from the Cleveland Company given to Mr. Kidder so to do. The grades and tracks on this line were not completed by this company until May, 1896. R. p. 115-206.

Defendant's exhibit 28, R. p. 218 shows correctly and distinctly the direction of this railroad line crossing a portion of the territory now disputed in this case. Complainant company under its grant of permission so to do still occupies this territory and uses this track. R. pp. 207-219-368.

When applying for a formal lease for this right of way in the summer of 1896, at the time he furnished his maps, Mr Bradt understood his company were occupying this ground already under an informal lease. Subsequently Mr. Bradt to make some corrections in the map already furnished by him of this railroad track, requested its return from the Engineer of the Cleveland Company in letters expressly setting forth the purpose of the maps so furnished by him. (See letter, exhibit No. 31-33, p. 219.) In the month of September, 1896, Mr. Jopling and Mr. Kidder acting for their respective companies had a conversation about the mining of ore on the boundary line under the lake bed at the place in question and in this conversation the boundary line was distinctly recognized and the mining operations of the respective companies regulated thereby. A map of the situation was made by Mr. Jopling which more fully explains the significance of

their conversation. (See R. p. 209 Map exhibits Nos. 24 and 28).

In the meantime during the years following the summer of 1892, the complainant company conducted its mining operations in the bed of the lake on the south side of the boundary line on the assumption that shore ownership on this lake had nothing more to do with property rights in the bed thereof.

Opposite the shore line of the Cleveland Company's upland where it extends into the southwest quarter of the southeast quarter of section 10, the Cleveland Company by the rule invoked in this case by complainant and by the method of ascertaining shore ownership admitted by complainant's, the river rule—the Cleveland Company would have owned a portion of the lake bed south of the south line of section 10 extending southwestward into that arm of the lake to the central thread of that arm through which a stream once ran into the main body. That ownership is best indicated by the triangle drawn upon the map, defendants exhibit 28, (R. p. 218), one of the angles of which is the section line.

Complainant company believing it owned all south of section line 10 has mined out all ore in that triangle, and it was all of the finest quality. The openings in that part of its mine left after the mining of ore had been either caved in or filled with rock and the mine structures there have thus been destroyed; neither can the openings be entered, as complainant company has filled these openings with rock from the surface during a series of years and they are now inaccessible. (R. p. 54-56-79.)

The locality of the filled ground is referred to by the engineer Bradt (R. p. 79) and is shown upon the

map, exhibit "G." In the ore body under this boundary line within this very triangle, both the trespasses of 1894 by complainant company and that of 1896 by defendant Cleveland Company were committed and settled for.

The significance afforded by this triangle is best shown on defendant's map 28 (R. p. 218) to which all the data from the other maps have been transposed to a scale.

How much ore complainant company has mined from the territory comprised within this triangle is not known and can never be known to any disinterested witness. No cross sections of openings were ever made by the engineer and the cubic contents of that drift can only be guessed at. (R. p. 56.) There is no offer in the bill of complaint to restore to the defendant the Cleveland Company, its property (by the riparian rights rule invoked by complainant) thus taken from it.

No evidence is left for a disinterested witness to determine the extent and value of the right which the Cleveland Company may once have had within the limits of that triangle.

The hazards of mining explorations and mining operations conducted by the Cleveland Company toward and into the deposit of ore lying along this south boundary line from the time they began boring in 1892, until the summer of 1896 are well illustrated by the evidence.

The borings from the complainant's side of the boundary line were expensive and discovered the existence of ore, but without valuable result. The borings from the north side through many hundred feet of rock to this deposit discovered ore, but without result. Even when the Cleveland Company began its long

drift through the solid rock to reach this south side, the chances seemed against a fortunate result and the experienced miner, Captain Walters, so expressed himself to Mr. Mills. Nevertheless the Cleveland Company conducted continuous operations from that time forward to determine the value of that property and the existence of a mine worth working.

Into the long rock drift run from the north side, costing for some of its distance at least from $15 to $17 per lineal foot, an electric tram road with rails and ties and wire and motor complete was introduced and carried forward with the work of development.

When the ore body was reached many drifts and levels were run in various directions—one-half of them in rock for the further purpose of development and all these drifts and levels aggregating 3,000 feet in length were in the interest of development continuously conducted for the purpose of making a mine as much as to determine the value of the deposit that mining might thereafter be conducted.

It was not until these hazardous expenditures and developments had been carried on to the summer of 1896, that great value was finally shown in the existence of a large body of ore in this territory. Then it was that the engineer and superintendent of the complainant company, who visited the workings, were surprised by the showing of ore and first learned how really valuable the work of the Cleveland Company had shown this deposit to be. (Jopling, p. 207).

On election day in the month of November following Mr. Kidder posted a notice directed to Mr. Mather, President of the Cleveland Company, giving him the first intimation that the complainant company intended to make the claim made in this suit. (Jopling p. 216).

In mailing this notice, Mr. Kidder remarked to Mr. Jopling that he thought "Mr. Mather will be very much surprised when he receives that notice!" And Mr. Mather certainly had warrant to be surprised.

ARGUMENT.

The defendant, The Cleveland Iron Mining Company, defends its rights to the possession forever of the territory in dispute for the following reasons:

(1) The patent under which the defendant, The Cleveland Iron Mining Company, claims title gave it title to the whole east half of section ten (10) to the south line thereof and complainant is barred from objecting to this claim because it has treated a body of water covering a portion of that territory as of no value and joined in the draining of the water as if the land was merely swampy ground valuable only when reclaimed and made dry land.

(2) Because it has title by adverse possession for more than fifteen (15) years.

(3) Because the south section line of ten (10) was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.

(4) Because the pumping contract is an estoppel by deed against the complainant from now asserting title.

(5) Because the complainant is estopped by matter in pais from asserting title to the land.

(6) Because the complainant is estopped by its laches.

(7) Because as a tenant of a portion of the

premises in dispute complainant is estopped to deny defendant's title.

I.

HAD THE CLEVELAND IRON MINING COMPANY TITLE TO THE LAND IN DISPUTE BY A PATENT?

The patent under which the Cleveland Company holds its title describes the parcel in question as the east half of section ten. It is not described as a fractional. To be sure the patent gives the number of acres in the east half of this section as five hundred and fifty-five and a fraction. At the time of this patent the government was the owner of all the remaining lands surrounding the lake, the patent to the defendant Cleveland Company antedating by one year or more all other conveyances. When other conveyances of the remaining lands upon the lake were issued, the parcels described in them bounding the lake were conveyed as fractional subdivisions or lots.

The question therefore arises whether the government did not intend by the use of the language mentioned in the patent of the east half of section ten, to convey the whole of it to the subdivision lines extending across the lake, regardless of the meandered lines of the lake.

It is a principle of the construction of conveyances by the government, that where the government has not reserved any right or interest that might pass by the grant, or done any act showing intention of reservation, one must construe the grant most favorably to the grantee, and that the government intended all that might pass by it.

Middleton vs. Pritchard, 3 Scam. 510;
Hardin vs. Jordan, 140 U. S. 371.

It is held that the statement of the number of acres contained in a patent does not limit the conveyance. It is intended only to enable the government to fix a price for the conveyance; and the same cases held that waters bounding the property conveyed are not reserved to the United States; that the meandered lines of the water body abutting the upland conveyed have no force in themselves to limit the grant.

Brown's Lessees vs. Clements, 3 How. 650, 665;
Ice Co. vs. Ice Co., 102 Mich., 228;
Hardin vs. Jordan, supra.

The rule of shore ownership, giving to the shore proprietors the ownership of soil under the water to the center of the stream or water body appurtenant thereto, is based on a rule of intention.

It has never been held in any of the cases that it would be incompetent for the government to grant to any individual the soil under a bed of water covering a subdivision of land, if such were the intention.

See also:

Moran vs. Lezotte, 54 Mich., 83, 88;
Keyser vs. Sutherland, 59 Mich., 462.

It is true that this lake was both meandered and surveyed and that the patent refers to the survey. It is also true that in ordinary cases the courts construe such a patent as conveying to the shore owner ownership of the soil under the waters to the central thread. This construction is always given to a conveyance of land upon a water body in cases where no difference in the language of the patent of one subdivision is found to exist as against conveyances of the other lands upon the same water body; in other words, where there is no such difference in the language of the several patents to several portions of land

upon the water body as indicate a difference of intention regarding the one as against the other.

The question submitted is whether or not, with the patent under which the Cleveland Company holds antedating all other conveyances of lands about this lake, and with a distinctive difference in the language of this patent, the Cleveland Company did not acquire under that patent, by a construction warranted by the rule that conveyance should be construed most favorably to the grantee, the entire subdivision, whether or not under water.

It is evident that when the Cleveland Company claimed, as it did as early as 1880, to own the entire subdivision down to the south line thereof, though a portion of the land was under water, the claim was based upon the language of the patent.

An important consideration involved in the construction by the courts to a patent of land upon a meandered body of water, is that the object of the construction is to carry into effect a supposed intention on the part of the government to give to each shore proprietor access to navigable water opposite and appurtenant to this shore line.

> Bay City &c. Co. vs. Industrial Works, 28 Mich., 182.

and that this construction for this purpose is favored because the government does not intend in making the grant to reserve any portion of land under the water.

The reason thus given for the construction of such grants by the government presupposes the existence of such a body of water as may be available as such; that the shore proprietor will have no use for the soil beneath the water; that he will have use only for the water itself, whether for navigation, fisheries, cutting

of ice, or other like purposes. The actual use of the soil under the water has seldom if ever formed a bone of contention.

Now, if adjacent shore proprietors treat any meandered body of water covering a portion of their respective premises, as if it were merely an obstruction to the use of the soil—as a mere swamp or wet place, to be drained for the purpose of reclaiming the land beneath—what right would such proprietors have to insist upon a construction never before insisted on, and which construction, if the waters had been such as they are really treated by the shore proprietors, would never have been made for their benefit?

In this case the complainant treated the water body in question as a mere noxious swamp, of no value as water for any purpose, and joined in getting rid of it to reclaim the dry land beneath, upon the understanding that the section line was a boundary—that the section line was the boundary exactly the same as if no water body had been meandered, and the land surrounding it had all been conveyed as upland. Ought not the complainant to be barred from claiming in its favor at this late day a construction of the government patent under which the defendant holds, which construction has only been indulged by the courts on the theory that the water body was a benefit to the shore owner, that a patent to the land abutting the water should be so construed as giving an uncertain boundary beneath the waters adjacent, only because such construction would be the most favorable to the grantee?

The Cleveland Company certainly claimed title to this land in the year 1880, and that claim was unquestionably based upon the language of this patent.

It appears from Mr. Bacon's testimony that not only did the Cleveland Company claim title to the south section line produced across the lake, but that the agent of complainant company in charge of its property acceded to, acquiesced in that claim, and in fact pointed out the section line to Mr. Bacon as the south boundary line of the Cleveland Company's property.

If in fact Mr. Kidder's statement is to be taken in preference to that of Mr. Bacon upon this point, and if it is true therefore, taking Mr. Kidder's version, that sometime during these early years Mr. Morse, then agent of the Cleveland Company, requested Mr. Kidder to procure from the complainant company a quit claim deed to the Cleveland Company of all the land in the east half of ten north of the south line in the body of the lake, in consideration of a quit claim by the Cleveland Company to the Angeline Company of all the land in the lake bed south of that line, this does not help the case of complainant, for it would indicate clearly a disputed boundary, giving rise to the necessity of the boundary settlement which followed in later years.

II.

HAD NOT THE CLEVELAND COMPANY THE TITLE TO THE TERRITORY IN DISPUTE BY ADVERSE POSSESSION?

In the year 1880 the Cleveland Company paid taxes upon the east half of section ten, assessed and levied upon that section, following exactly the language of the patent. In 1895 the same company paid taxes upon the same section, assessed and levied as before. There is no evidence in the record to dispute or vary

the tax history of this parcel as having been continuous between the years mentioned.

Upon the testimony of Mr. Bacon the complainant company, acting through Mr. Kidder, pointed out to the former in the year 1880 or 1881, the south line of section ten produced across the arm of the lake as the south boundary line of defendant's property. It was done at a time when the Cleveland Company's agent was inspecting his property line. The circumstance cited fully in the statement of facts herein, amounted to a claim of possession by the defendant Cleveland Company, and an acquiescence therein by the complainant company.

With this acquiescence therein by the complainant company, in defendant's ownership and claims, it is not necessary to show continuous acts of possession for fifteen years to give the Cleveland Company title upon the theory of adverse possession. Possession once begun by acquiescence of the other party, is presumed to have continued, unless the contrary is shown.

But more than this, during all the years following the claim of possession in 1880, and even before that, down to the commencement of this suit, the Cleveland Company was in actual possession and working mines in the upland of this east half of section ten.

Had the Cleveland Company been an actual trespasser during this time, it could not have contended by its actual possession of a portion of the premises for constructive possession of other portions. But the patent under which it claimed title to the whole subdivision down to the south line, undoubtedly gave the Cleveland Company a color of title at least.

Miller vs. Davis, 106 Mich., 301:
Fuller vs. Swensberg, 106 Mich., 305.

A party holding possession, open, notorious, adverse and continuous, under a claim of title, (a claim of ownership admitted and acquiesced in meets all these conditions), need not have actual physical possession of every part of the subdivision claimed by him under that title, but his possession of a part may be construed to be possession of the whole.

Millerd vs. Reeves, 1 Mich., 107.

But however this may be, the act of possession in 1880 constituting a claim of possession and acquiescence therein, was a sufficient actual possession at that time; and the payment of taxes and claim of title since that time are sufficient to warrant the presumption of continuous adverse possession, no other facts appearing to the contrary.

Murray vs. Hudson, 65 Mich., 670.

While the decision of this question one way or the other is not at all necessary in this suit, it is submitted that as against the bill of complaint this objection is alone sufficient to bar a decree in complainant's favor.

III.

THE SOUTH BOUNDARY LINE OF SECTION TEN BETWEEN THE EAST HALF OF THE SECTION AND THE PROPERTY OF COMPLAINANT IN SECTION FIFTEEN, WAS AGREED UPON BETWEEN THE PARTIES AS A BOUNDARY, AND THE AGREEMENT HAS BEEN FOLLOWED BY MANY SUCCESSIVE ACTS OF THE PARTIES ON THE FAITH THEREOF, BY WHICH THE CLEVELAND COMPANY CANNOT

BE RESTORED TO THE CONDITION IT WOULD HAVE BEEN IN IF THE CONTRACT HAD NOT BEEN MADE AND ACTED UPON.

In discussing this proposition let it be assumed that the south line of section ten was not made the southern boundary of the east half of that section by the grant itself. Let it also be assumed that the Cleveland Company at no time held actual adverse possession of the property in dispute for a period of fifteen years. Yet we confidently submit the circumstances, acts and agreements of the parties clearly establish such an agreement as stated above.

If the Cleveland Iron Mining Company claimed title under its patent, and if the complainant company did not acquiesce therein but claimed a line in the lake in some undefined, unascertained place, on the theory of shore ownership, then the circumstance is presented of a disputed boundary—a claim on one side of title under the patent, and a denial of the claim on the other. It is certainly true of the condition of this boundary in 1880 and 1881 either that the Cleveland Company claimed title under its patent which was acquiesced in by the complainant, or it claimed title but the claim was not acquiesced in by the complainant, or the Cleveland Company made no claim whatever regarding the line, but the complainant company claimed the title to be in the lake in an undetermined place: or both companies recognized the uncertainty of that line, and the request for an interchange of quitclaim deeds was made by the Cleveland Company and refused by the complainant company, as was testified to by Mr. Kidder. It is a matter of absolute indifference which of these was the truth, in view of what followed.

In view of the tremendous operations in the district in question since the year 1890, the great transformation of physical conditions, the entire good faith of the Cleveland Company in bringing about these changes and spending vast sums in the hazardous enterprise of showing value in the territory in question, in putting in peril its great mine and works under the bed of the lake outside of the disputed territory, in surrendering without complaint land it might claim on the shore ownership theory south of the section line in undertaking the permanent obligation regarding permanent drainage, all these upon the faith of the recognition by the complainant of the south line of the section as the boundary, and upon its numerous acts and declarations to the same effect, the court will in our opinion find a reason for preventing the complainant, who has suffered all this hazardous expenditure and all these great physical changes in conditions, from now obtaining any benefit therefrom when they have finally turned out to be profitable.

Prior to the year 1890 the territory in question adjacent to the south line of section ten on both sides of the line was not supposed to possess any certain value. It was land located in a mining district, but unknown, and might be worthless. In the year men tioned, suspecting ore to exist in that locality, complainant began sinking a shaft. In May, 1891, ore was struck in this shaft. (Walters, p. 116). By the middle of March, 1892, complainant had drifted upon the ore there found a distance of sixty-five feet northwest from the shaft. (R. p. 122). On the 8th of February preceding, complainant had begun running its drifts from the shaft in an opposite direction that is towards the southeast. (R. p. 122). By its

operations complainant had ascertained prior to the month of March, 1892, that its discovery was one of value. (R. p. 122).

While the ore had been proven to exist when it was reached in May, 1891, and though practically continuous exploration was continued by complainant in that locality up to the time of the making of the pumping contract, and while greater value in the deposit was proven as time and exploration thus progressed, yet at the time of the making of the contract in March, 1892, complainant did not then think the ore body discovered by it extended far enough northwest to go over the section line.

Kidder, p. 101.

Walters, p. 133.

On the discovery of this valuable deposit it became of overwhelming importance to complainant company that the boundary line should be settled beyond dispute.

Mr. Kidder certainly at one time claims he believed his company owned the land north of the section line in the bed of the lake. If so, he knew the line was undefined, uncertain, difficult of ascertainment.

It is presumable that Mr. Kidder's president and board of directors were equally informed with himself on this subject, and were equally exercised with him upon the question of a boundary to which this valuable discovery so nearly approached.

By the rule of shore ownership under which Mr. Kidder says he once claimed, the shore owner owns that portion of the bed of the water body opposite and appurtenant to the shore, to the center of the stream. The lines of ownership are drawn at right angles with

the thread of the stream from the shore front, regardless of the extent of territory back of the shore front.

Clark vs. Campau, 19 Mich., 328.

By this rule a triangle of territory would be formed in the bed of the south arm of the lake south of the section line, which—if Mr. Kidder's testimony is correct—he must have believed the Cleveland Company owned.

The lines showing this triangle are drawn upon map Exhibit 28, and were referred to by several witnesses in the testimony.

Unless the Cleveland Company acquired title to the south line by its patent or by adverse possession, it certainly did own the territory comprised in that triangle at one time, on the theory of shore ownership involved in this bill.

Whatever may be said in this case about the conduct of Kidder as affected by the case of Clute vs. Fisher, his own testimony shows he was left in doubt even after he was advised about the case. It does not appear whether he advised with his company about that case. If he did, it is not probable that the astute lawyers of a corporation with such great interests at stake could have misapprehended the dictum in that case for a rule of property. It must be clear from any view which can possibly be taken of the situation that the urgent need of a settlement beyond dispute of the boundary between the property of the complainant and the Cleveland Company appealed to the complainant company.

If the complainant could have made Clute vs. Fisher a rule of property, it would doubtless have gladly done so on the discovery of the mine in the southeast arm, for the ore there found extended close

to if it did not actually enter the triangle, so that under Clute vs. Fisher that triangle would have belonged to complainants.

At that time no ore was known to exist north of the line. Complainant therefore could afford to receive the decision of Clute vs. Fisher with favor, and hope it might never be reversed. But did complainant company believe that if a valuable mine was shown to exist within that triangle, the Cleveland Company would likewise accept Clute vs. Fisher as of binding force?

We all know the rule referred to so many times in the brief of complainant's counsel—Clute vs. Fisher—was a dictum, unsupported by the body of law in this State previous to that time; that it was expressly renounced in 1888 in the case of Wilson vs. Hoffman; that it never was the law of the United States courts, or of this court.

Is it not too much to suppose therefore that the president of complainant company in Pittsburgh, Pennsylvania, while he may have hugged the hope that the decision would be accepted by the Cleveland Company, hesitated to trust thereto?

The development about to be undertaken was too important to risk a doubt.

At the time of the discovery in question complainant was confronted with the presence of the waters of this lake for the first time as a menace to mining operations.

All the parties to the pumping contract were mining men of great experience, aware of the hazards of mining operations, the great expense involved in exploration, the uncertainty attending such expenditures, the exercise of discretion, care and skill in such

an enterprise, the great sums of money involved, the rapid changes in values affected thereby, together with the great physical changes effected in surface conditions—all these were well known.

No one of the shore owners in question could drain this lake without the consent of the others, neither could divert the water or pollute it without common consent, neither could so conduct mining operations beneath the bed of the lake in any place in such manner or take out ore to such extent in mining upward toward the surface in the bed, as to hazard the caving in of any part of the lake bed, thus not only destroying the mine beneath but disturbing and diverging the waters reaching to other shores.

Any arrangement by which the great expense that would be incurred in the pumping of this lake, by which such expense could be apportioned between several shore owners, and by which the subsequent operations of each in caving the surface were to be guided, appealed irresistibly to the common sense of each of the three parties as requiring a definition of boundary that could never be thereafter questioned.

No officer or agent of complainant company could plead ignorance of such a necessity—or an immediate recognition or repudiation of the section line as a boundary.

Every doubt possible to be entertained at that time—and the situation was so important that the complainant must have been compelled to search the entire field for the discovery of a possible doubt—must have impelled its officers not only in their own behalf to save their own rights and preserve to them the fruits of their own enterprise, hazards, expenditures and discovery, but to protect their brethren engaged in similar

enterprises, whose necessities, in view of so great an enterprise to be undertaken, were equally great, to say all they had to say at that time or never.

Pertinent to the situation is the opinion of the Supreme Court of the United States in the case of Twin Lick Oil Co. vs. Marbury, 91 U. S., 592-3. In that case the court estopped the complaining party from litigating the title to land valuable only for mining purposes, who had stood by and witnessed its development by a defendant claiming title:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing to-morrow, and that which would to-day sell for one thousand dollars as its fair value, may by the natural changes of a week or the energy and courage of a desperate enterprise in the same time, be made to yield that much every day. The injustice therefore is obvious of permitting one holding the right to assert an ownership in such property, to voluntarily await the event and then decide when the danger which is over has been at the risk of another, to come in and share the profits. While a much longer time might be allowed to assert this right in regard to real estate, whose value is fixed, on which no outlay is made for improvements, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

The changes effected under the pumping contract on the faith of the boundary line therein set forth, upon the apportionment of expense and burdens therein

imposed, based on the boundary there stated, strikingly illustrates the above opinion applied to the mining of iron ore and the circumstances confronting the plaintiff in March, 1892.

It was better at that time for each of the parties in this suit to assume a boundary line between their properties which might possibly be wrong, rather than leave it unsettled or involved in any possible doubt.

Complainant seems to have been the proposing party in effecting the pumping contract.

The execution of that contract must necessarily have been preceded by many negotiations, and the final agreement between the parties, before the terms of the contract, or any paper relating thereto were actually formulated.

The letter of complainant's superintendent, Capt. Walters, (Exhibit 2, R. p. 174), enclosing therein with a request for its signature a proposal as to certain of the terms to be embodied in a pumping contract (Exhibit 3, R. p. 175), is the first written item of evidence in point of time in the negotiation, though that paper must have been discussed and settled by complainant company before it was written.

The letter of Mr. James Laughlin, Jr., president of complainant company, given in the statement of facts, and dated August 18, 1893, in which he refers to the terms of the pumping contract previously made, furnishes evidence that he had passed upon the terms of the contract before its execution.

The petition to the Common Council, signed by the local officers of the three companies, in which is exactly defined for the purpose of their future contract, the boundary between their respective properties constituted the first act toward the actual execution of

the contract, and it must necessarily have been approved by the general officers of the respective companies, in advance of its presentation to the Common Council. The pumping contract itself recites the fact that the terms of a contract with one Howell, a contractor, for the work of pumping, had already been formulated and practically agreed to.

The pumping agreement further recites the fact that it is made for the mutual benefit of the three companies, parties thereto, *for the purpose of enabling each to mine the ore belonging to it in the bed of Lake Angeline.* This recital alone implies that each of the companies in the negotiation preceding this contract had defined exactly what boundary it claimed and what boundary was conceded by the others: for in no other way could either know what ore each was to mine from the bed of the lake or how the relative expense of each for doing the work ought to be apportioned.

Therefore the petition to the common council signed by the local officers of the three companies, ratified afterwards by the pumping contract, and necessarily made at the instance of the three companies to secure the objects therein proposed, is in itself, though signed by the local officers as it was, a definite boundary agreement. Though it does not constitute the pumping agreement so called, it is sufficient alone to stand as a boundary agreement, because it was made to secure the consent of the city of Ishpeming to pumping the lake: it was by its own terms to form the basis of a mutual agreement between the parties: it was certainly well known to complainant company and was always acquiesced in. Therefore, whether signed by the presidents or only the superintendents of the

respective companies, whether under seal or not, it was sufficient to form a boundary agreement, because the knowledge of its terms and the use of it for the purpose therein expressed by complainant company, acquiesced in for a long period of years, was a ratification complete, and such ratification was sufficient to make it a written agreement.

That paper bears upon its face evidence that it did not contain all the terms, it at least contained terms previously agreed to between the three companies that their respective boundaries were as therein set forth.

But the pumping agreement signed and executed under seal by the three companies, was dated on the 17th day of March, following by only one day the presentation of the petition to the common council and its action thereon by the latter body.

THE PUMPING AGREEMENT

recites the fact that ore had been discovered in the bed of the lake, and it had become necessary to pump the water therefrom and thereafter permanently drain the lake bed, in order that each of the parties might economically mine such ore in such portions of the bed of the lake as each of said parties is respectively entitled to.

That it was necessary to close the Howell contract in order to permit operations to begin while solid ice remained in the lake;

That the Cleveland Company, *after having communicated with both the other parties* (previously) and getting their approval had already entered into the pumping contract with Howell to pump the lake for $33,000.00, and a certain additional sum for purchase of pump appliances;

That the cost of continuous drainage after the water should have been pumped therefrom, was at that time impossible of ascertainment:

That the parties are desirous of fixing the proper proportion of expense both of purchase of pumping apparatus, pumping out of the lake under the Howell contract, and the cost of continuous or permanent drainage of the lake bed, to be borne by each of the parties.

These recitals incontestibly prove not only the necessity for the definition of boundary between the parties, but that the parties had necessarily and finally agreed upon such boundary.

Then follows the agreement between the first, second and third parties, by which the Cleveland Company agreed to pay eight-fifteenths of the original cost of pumping the lake.

And afterwards to assume the burden and advance the entire cost of continuous drainage—the keeping of the lake bed dry, the expense of which was to be divided between the Cleveland Company and the Lake Superior Iron Company. It also agreed to repay, after the lake should be pumped out, to the Lake Angeline Company, the one-fifth part of the then value of the pump, which the Angeline Company would own after the lake was drained.

The Lake Superior Iron Company agreed to pay four-fifteenths of the original cost of pumping and purchase of appliances: also to repay to the Cleveland Company a proportionate part of the cost of continuous drainage in after years, based on the respective tonnage of the Cleveland and Lake Superior Iron Companies on ore thereafter mined by them from the lake bed.

The Lake Angeline Company agreed to bear three-fifteenths of the original cost of pumping and of the purchase of pump appliances. But the three-fifteenths of the cost to the Angeline Company of purchase of pump appliances was to be refunded to it by the Cleveland Company after the lake should once be pumped, and the latter company took the pump and began with its burden of continuous drainage.

Further, the Lake Angeline Company also agreed to divert the water which would enter the lake south of the section line by a flume, into which flume it was to turn all the water pumped from its own mine; and this drainage was to be carried on by the Angeline Company at its own expense, "until the iron ore to which said third party is entitled lying on, in or under the portion of the bed of said lake lying south of the said south line of said section is mined and exhausted, and then to turn over said flume in good repair to the first and second parties without charge and allow them thereafter to operate and maintain the same for the purpose of continuous drainage, giving them free access to the flume for that purpose." (R. p. 90.)

This drainage was thus to be taken care of by the Lake Angeline Company of water "which would otherwise come into the present bed of said lake from all the land lying above the present water level of said lake and south of the south line of section 10 as projected through said lake." (R. p. 90.)

When Howell's contract was completed there remained in the bed of the lake a large quantity of mud which had to be pumped out.

In the letter of Mr. James Laughlin, Jr., President of the complainant company, heretofore referred to, dated August 18, 1893, (Defendant's Exhibit 12), (R.

p. 181), repudiating any obligation of complainant company therefore he said:

> "You cannot but admit that under no circumstances were we interested in pumping the mud out of the bottom of the lake, and had such a contingency been stated in the contract we would not have become a party to it."

This adds to the volume of literature involving the agreement upon the proposition that the Lake Angeline Company had no interest whatever in any portion of the bed of the lake north of the section line, except to be assured that the other two companies should never allow the water to rise in the lake bed high enough to overflow into the shallow bed of the southeast arm and thus enter the mine of complainant in that part of the lake bed.

It would have been difficult indeed for the three parties to have made a contract by which it could have appeared to any disinterested person more certain that a boundary had been agreed to, based upon a good reason for such agreement, to be followed by such consequences that an omission to agree to a boundary would have been too marked for discussion or oversight, than the agreement in question with its accompanying documents.

If quitclaim deeds had been executed between the several companies, they would have left no room for question: they would have been no more solemn in form nor more irresistible in pointing to an agreement than the pumping contract itself, for the latter was founded upon a consideration which compelled agreement as to boundary.

By that contract the defendant Cleveland Company surrendered forever any claim which it might

make to the territory within the triangle south of the section line. That the complainant company so construed it is witnessed by the fact that the complainant company actually mined out that territory, filled the openings with rock, caved other portions, and destroyed it as a mine.

Following the agreement the lake was pumped out. After it was pumped the Cleveland Company and the Lake Superior Iron Company continued permanent drainage from December, 1892, until the date of this suit, at an annual cost of from $5,000 to $8,000, in which complainant company had no part. Of the total cost of $76,000 up to the time of the suit, the Cleveland Company had paid nearly $50,000, and the Lake Angeline Company but $7,000 as their respective proportions of cost to that time. The Cleveland Company, after the lake was pumped dry, continued mining operations to the surface of the lake bed, thus caving it so that it is now impossible to allow the lake to be filled with water without destroying that mine.

In the summer of 1892, the Cleveland Company began explorations in its territory north of the south line adjacent to the mine of complainant south of that line, and bored five drill holes into that territory from complainant's mine under permission from it, and five other drill holes into the territory from the surface above. It drove a long rock drift 600 feet or more through solid rock to reach the territory in which the drills had discovered the existence of ore, but how much was undetermined. From the year 1893 until the fall of 1896, the Cleveland Company continued without interruption the work of exploration in that same territory, to show up all that could be known of the deposits of ore there found by it, in which time it made 3,000 feet

of drifts and tunnels and completed a mine structure as substantial as a house. During the same period of time from the summer of 1892 until September, 1896, trespasses over the south line of ten were settled for by complainant and the Cleveland Company respectively; nails were driven in the wood structure in the mine underneath that line to define it as a boundary, on two different occasions, to.wit: in the year 1895 and again in the winter or spring of 1896. After the lake was pumped dry the original shores have been obliterated in many cases, principally by the complainant, and the lake bed treated as if a lake never had existed there. In the summer of 1896 the complainant company negotiated for and obtained of the Cleveland Company the right to build a railroad track across the very territory in question which the complainant company actually occupied during the winter of 1895 and 1896, under an oral permission so to do, granted by the Cleveland Company.

That the pumping contract therefore was a certain and definite settlement of the boundary between these parties, and that it was followed by such continuous acts of recognition that the Cleveland Company certainly now can never be restored to the position it was in before that contract was made, is too plain for further argument. And that it constituted a boundary settlement of the most satisfactory kind is supported by all the authorities.

Manistee Mfg. Co.vs. Cogswell, 103 Mich., 602;
Jones vs. Pashby, 62 Mich., 614;
Same vs. same, 67 Mich., 459;
Smith vs. Hamilton, 20 Mich., 433;
Joyce vs. Williams, 26 Mich., 332;
Diehl vs. Zanger, 39 Mich., 605.

The position of the complainant in this suit in contending against the force and effect of this boundary settlement, is the most anomalous ever occupied by a suitor in a court of equity. It is still insisting upon the performance of that contract on which it realized and which so far from repudiating it actually introduced in evidence as a part of its main case? Under that contract the complainant company received valuable considerations, which it has not only used to the full but can never restore to the defendants; and these considerations, these benefits which it has thus received, under the sanction and by the terms of that contract, it not only refuses to relinquish, it does not even propose to do so; yet it asks that we be restrained from doing what in that contract is solemnly agreed we might do.

The contention of the solicitors and counsel for complainant upon this head is worthy an analysis, unique and unheard of as it is.

They refer to the flume constructed by complainant for keeping out its own water, coming into the lake bed from its own side of the section line, as some kind of a set-off to the immunity given that company for keeping the lake bed dry after it once was cleared of water. Just how the fact could militate against the definition of the boundary is not pointed out.

The reason for complainant's building and taking care of that flume until the ore the complainant was entitled to lying south of the section line should be mined out, is clear enough to need no explanation. A part of the water taken by that flume carries off the stream which would otherwise flow directly into complainant's mine in the southeast arm before it could reach the bed of the lake. The remaining portion of

the water taken care of by that flume is the water pumped out of complainant's own mine. It is quite unseemly for complainant to arrogate to itself any importance in its own behalf in thus taking care of the water springing from such sources. the testimony shows without contradiction that water coming from the hillsides on complainant's side of the mine not entering from the stream, actually flows into the lake bed through a culvert built in the railroad embankment opposite the mouth of the southeast arm for the express purpose of letting this water into the lake bed, there to be pumped by the defendant companies at their own sole cost and expense.

On the large map exhibit 28 is shown the culvert in question; opposite the mouth of the southeast arm and but a little way beyond that culvert the pump operated by the two defendants in continuous drainage is located in the deepest portion of the lake bed.

Jopling, p. 217.

Defendants' Exhibit 28, R. p. 218.

When complainant's solicitors undertake to contend with the clause of the agreement stating what ore complainant is entitled to, and clearly showing the reasons for the flume as based on the fact that it took care of water which would otherwise come from complainant's own premises into complainant's own mine, and whereby complainant was relieved of any expense for the continuous drainage of water in any other part of the lake bed north of the section line, they repeat over and over again the clauses in question, but do not succeed in their extended argument on this subject in showing that the agreement does not definitely settle the boundary and define it in such way that there can be no mistake.

The solicitors sum up their argument, and all that is said by them on the subject, by the claim for the clauses referring to the ore in which only complainant is interested as being south of the section line "that the clause is expressive of the same mutual mistake as appears all through this testimony in the mutual dealings between the parties." This not only begs the question as to whether the clause is definite as a statement of boundary, and impliedly admits that it is definite, but the contention is absolutely untrue in fact that there was a mutual mistake in this case.

The counsel for complainant makes the somewhat dogmatic statement that the pumping contract was not made to settle or dispose of a disputed boundary; that the question was never mooted, and that there is no evidence that these questions had formed the subject of prior discussion or negotiations, and that therefore the pumping agreement could not operate as a boundary settlement.

In this contention the counsel for plaintiff has overlooked the testimony of Mr. Kidder and Mr. Walters utterly, wherein those witnesses say that on two different occasions they were requested to sign papers recommending the complainant company to exchange with the Cleveland Company quitclaim deeds in order to settle the boundary between them as the south section line.

The solicitors for complainant, in their long brief to the proposition that the pumping agreement is not sufficiently definite and certain to be an estoppel by deed, cite vol. 7, American and English Encyclopaedia of Law, and the cases of Brooks vs. Haines, and Jackson vs. Allen. Neither the text cited nor the two cases support the proposition.

The facts from the record in themselves amply controvert the unsupported assertion of the counsel for complainant to the contrary, that the question of a boundary was never mooted. There is no escape from the proposition that it was in doubt, even though the Cleveland Company claimed it to have been settled by its patent; even though the Cleveland Company claimed to have been in adverse possession for fifteen years; even in spite of the testimony of Mr. Kidder wherein he describes the effect upon his own conduct of the opinion he received from his own attorney regarding the case of Clute vs. Fisher.

That the very foundation of the pumping contract is a definition of the boundary between the several properties is too plain for argument. The denial by the defendant company of any interest in the bed of the lake north of the south section line, can be referred to no other cause than that the south line was the boundary. Would it not be absurd to believe that complainant company did not thereby renounce territory north of the line and lying in the bed of the lake? Is it not absurd to undertake now to construe that contract upon the hypothesis claimed by solicitors for complainant, that all the provisions of the pumping contract requiring expense might be carried out and yet leave the complainant free to claim ownership of the land down in the deep bed of the lake toward the apex of the dotted line, the "equitable center," so-called? To permit such a construction for complainant would be to admit that this contract made the singular provision that the defendants were to keep forever dry and free from water premises of the complainant in the deep portion of the lake, *even after*

complainant had exhausted all the ore it was entitled to south of the section line.

But none of the cases cited in this brief from which a boundary settlement has been found to have been made, exhibits the necessity of an agreement containing the expression, "this agreement has been made to settle a boundary." In all the cases any evidence going to show that a boundary was in doubt and that it had ever been disputed, was held sufficient to warrant an arrangement afterward made by which a boundary was settled on, would constitute by a mere inference a boundary settlement, on the ground that there having been room for doubt, the parties when they finally settled upon the boundary must be presumed to have intended it was a settlement of that boundary.

But the counsel for complainant further contend that even if that contract was a boundary settlement, the complainant is not bound by it, because it was a mistake.

They base this wholly upon the testimony of Mr. Kidder, who said that before the case of Clute vs. Fisher came to his knowledge he had contended that the boundary of complainant's premises was somewhere in the lake, beyond the section line north of it. Some one told him about Clute vs. Fisher, and he thereupon went to his counsel and asked an opinion. The counsel advised him thereon to the effect that there was such a decision. Mr. Kidder thereupon, without appearing to have consulted his superior officers, and without any delay, moved certain buildings erected by that company on made ground north of the section line, removed them to the south. Mr. Kidder also con-

tends that his subsequent actions were all governed by the case of Clute vs. Fisher.

Upon cross-examination by Mr. Hanchette, Mr. Kidder testified that after obtaining Mr. Clark's opinion about Clute vs. Fisher:

> "We then as a matter of protection moved those buildings mentioned to the south of the line in order that we might save them in case Mr. Clark's opinion proved to be correct. I did not make any further inquiry as to our rights, not at that time. I accepted Mr. Clark's opinion as final on the subject, so far as to govern my actions. I understood it to be only a matter of opinion. I understood it to be his opinion, but that the decision was definite by the Supreme Court.
>
> "Q. (By Mr. Hanchette). So long as the matter remained in an opinion it was a matter of doubt, wasn't it? A. Yes. Q. You were also aware of the fact that the courts sometimes change their opinions, were you not? A. I have very frequently thought that with reference to this very thing the Supreme Court might change sometime. Q. And rather than investigate any further or raise any question about it, you concluded to accept the opinion as rendered by Mr. Clark. Is that it? A. Yes, that is so."
>
> R. p. 101.

There is not one word of evidence in the entire case that the defendant Cleveland Company was ever told by Mr. Kidder that he had heard of and relied upon the case of Clute vs. Fisher, that he recognized the section line as a boundary because of that case: there is not one word of evidence that the Cleveland Company ever relied upon that case or ever heard of it. On the contrary it clearly appears that their claim to owner-

ship was based on their patents which gave them the land north of the section line. And it is too much to ask this court to believe that the attorneys for the Cleveland Company recognized Clute vs. Fisher as establishing a rule of property, or as anything more than a mere dictum.

Further, it is quite apparent from Mr. Kidder's own testimony that he lost no time in acting upon Clute vs. Fisher on his own motion: in fact that he acted with the haste of one who is glad to accept the construction he appears to have been led to give it. It is quite apparent also from this testimony that Mr. Kidder knew he was taking chances in so doing, and the case did not remove the doubts from his own mind.

If the complainant company ever did any act based upon Mr. Kidder's opinion of Clute vs. Fisher, the testimony is ample warrant for the conclusion that it was gross negligence to do so: if not, then at least the fault of any mistake he should make was upon him alone.

If it was a mistake, it was not mutual.

Counsel for complainant, arguing upon these premises, contend that the pumping contract, if found to be a contract, should be overturned because based on Mr. Kidder's mistake: that if any agreement can be implied from the facts in the case, that agreement should be overturned because of Mr. Kidder's alleged mistake: if any estoppel *in pais* can arise from the circumstances, such estoppel cannot work against complainant because of Mr. Kidder's alleged mistake.

Throughout the entire argument the counsel for complainant in urging this objection is compelled to insist that the mistake was mutual, contrary to the undisputed facts.

To support his proposition is cited the case of Wilson vs. Hoffman, 70 Mich., 552, in which it was claimed a boundary line agreed upon by a mistake of law on the part of one of the parties was held no estoppel.

In Wilson vs. Hoffman the court distinctly holds that the dictum in Clute vs. Fisher is not the law; and this was as early as June, 1888. Upon the question of estoppel the facts in that case appear to be that Hoffman claimed title upon some such principle as Clute vs. Fisher once seemed to have declared. On his making the claim to the other party, that other party agreed, in behalf of certain minor heirs, upon a division of the disputed territory, upon which the line agreed upon by them was marked with a brush fence, but no other act of improvement nor change in the condition of the parties followed the building of this brush fence. The other party had agreed with Hoffman that he would procure from the minor heirs when they came of age a quit claim deed of the portion of the disputed territory set off to Hoffman, but within a year thereafter announced to Hoffman they were satisfied the law gave Hoffman none of the land, and that they rescinded the agreement. The court held this was no estoppel. In this case it appears there was a mutual mistake of law. It also appears that minor heirs were to be bound by the agreement, and it further appears that no act worthy of the name of improvement or change in condition of the parties followed their agreement. The case therefore has no application.

The counsel also cites Spence, Eq. Jur., 631; Story, Eq. Jur., 123; Renard vs. Clink, 91 Mich., 3; Whelan's Appeal, 70 Pa. St., 410; Hearst vs. Pujol, 44 Cal., 230;

Morgan vs. Dod, 3 Col., 551; Blakeman vs. Blakeman, 39 Conn., 320. There are some other cases cited in the brief of the learned counsel, but these are sufficient for the purpose of argument.

Spence, Eq. The text states the principle generally, that where one parts with his property without consideration, pays money by mistake, signs a deed which was not the deed he agreed to sign, etc., equity will relieve him. The text here does not discuss a case where the other party to the transaction was innocent of any mistake or of any wrongdoing or had acted on the faith of the agreement and could not be restored.

Story's Eq. The text cites a case parallel to Renard vs. Clink—the release of a mortgage by mistake. It is here stated that in the case cited no facts are shown which give adequate reason for the decision rendered in the case that the party having made a mistake could be relieved from his contract; that these facts might have shown imposition by the defendant, undue influence, or suppression by the defendant of important facts which the plaintiff should have known; that if the case cited in the text had proceeded on the naked ground of mistake of law it could not be reconciled with other cases. The text further declares that if the mistake had been mutual to both parties, then it offers a case where both parties have made an agreement which they did not intend to make, and that on such a ground the decision might be upheld. In the same text, in section 125, the law writer declares that a compromise effected between parties both innocent of any wrong, and upon a doubtful question of law, under a mutual mistake, cannot on principle or authority be overturned. The same text, in sections 126 and 127, declares that where a party is wrongly advised about

a well settled principle of law, no mistaken action based thereon will afford him relief from his contract entered into under the influence of such mistake.

The text in Story just referred to cites the opinion of the Chancellor in the case of Lyon vs. Richmond, 2 John's Ch., 60, where the chancellor held:

> "The courts do not undertake to relieve parties from their acts and deeds fairly done, (on a full knowledge of facts), though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law; there is no other principle which is safe and practicable in the common intercourse of mankind. And to suffer a subsequent judicial decision in any one given case on a point of law to open or annul everything that has been done in other cases of like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences."

In the same Story Eq. Jur., cited by the learned counsel for complainant, in section 128 the law writer further declares that in cases of alleged mistake of law the court will not relieve a party urging such mistake unless it finds fraud or undue influence, chargeable to the other party, as leading to or inducing the mistake; that it is not really a mistake of law that furnishes grounds of action for the court, but fraud or undue influence.

In all the foregoing text it is apparent, that where a party is relieved from any kind of action taken by him in contract relations with another party, from the effect of his contract, some other element must enter into the court's action than the mere mistake of one of the parties—that the court will never relieve such a party from the mistakes, unless from the fact

that the other party to the contract has paid no consideration for what he has received, holds what he is not entitled to, and his condition remains unchanged and it would be inequitable, unconscionable, to permit him to hold what he has obtained.

Renard vs. Clink. In this case, under mistake a mortgagee refused acceptance of an amount claimed to have been tendered to him to discharge a mortgage. Under the statutes of Michigan such refusal ordinarily works a forfeiture of the security. The mortgagee insisted upon his mistake in order to prevent the forfeiture, and estoppel upon him was pleaded by the other party. The fact was the mortgage had not been paid. The mortgagor had not been injured by a refusal and to permit the estoppel to be enforced against the mortgagee would have resulted in depriving him of the property in an incumbrance which had never been paid. To prevent an injustice to the mortgagee, and to prevent the mortgagor from thus obtaining property absolutely without consideration, where the mortgagor had not been injured, the court refused to enforce the estoppel. It was a case like some of the others already cited, where the court adopted an exception of the rule in order to prevent an injustice which would have ensued to an innocent party, guilty of no intentional wrong, and whose act had caused no injury or change of condition between him and the other party.

Whelan's Appeal. This case presents the effort of the complaining party, a widow, to reopen a probate settlement of accounts. The reasoning all appears in the finding of the lower court the conclusion of which is approved. The learned counsel refers to this case as holding that where a party has acted in misconception or ignorance of his title and executed an

agreement to his prejudice, he will be relieved in equity. The case cited does not support this proposition. The case was this: The title of the widow Fry to one-quarter part of her father's estate rested upon his will, and upon the question of what charges had been made in his books against the share which would come to her. She was ignorant of her title, because she was ignorant of what the books showed; and she applied to the executors whose accounts she sought to be opened, for information as to what the books showed, to enable her to know what her title was; but she was refused such information. The court held that her ignorance of her title was not the result of negligence on her part but an ignorance forced upon her by the refusal of the executors to furnish the evidence she had called for; and that the facts as presented did not show a case based upon the doubtful construction of a will, (for "will" read "decision"), which equity will never relieve, but is mixed up with other considerations of law and fact which take it from the operation of the rule that equity will not relieve from a mistake of law. The case too presents the fact that the widow's portion of the property had been given to another without consideration. There was no question of change in condition upon the faith of the settlement, or acts done by which the other party could not be restored; and the case has no application. It is rather a strong affirmance of the doctrine contended for by us.

Morgan vs. Dod. This is a case of a surrender by the complaining party of an unsuspected title, based upon a mutual misapprehension by both parties of the law relating to a pledge. Acting under that mutual misapprehension of the law one party obtained possession of property to which he was not entitled. And

here, too, there was no question of consideration paid or change in the condition of the parties. And in giving its decision the court recited the fact as warranting its decision, that to deny relief to the complaining party would give to the other party an unconscionable advantage, and where the circumstances made it quite practicable to place both parties *in statu quo*.

Hearst vs. Pujol. This case is almost identical in character with that of Morgan vs. Dod.

Blakeman vs. Blakeman. In this case a right of way through a lane was extinguished by the purchase of the servient estate by the owner of the dominant estate. The owner afterwards sold the dominant estate and conveyed by warranty deed, with privilege and appurtenances. In making the sale the seller represented to the purchaser that the right of the lane was preserved and existed and was conveyed to the purchaser by the deed. The grantee paid his consideration to cover the right of way, and supposed the deed covered it, as did also the seller, and the purchaser would not have paid his consideration for the land alone. Both purchaser and seller were ignorant of the legal principle that the right of way had been extinguished, and both believed it still existed and was conveyed as mentioned. The mistake was regarded as one of fact by the court, and not the mistake of the legal effect of a deed. Equity relieved the grantee, who had thus paid his consideration for what he did not obtain. The case offers a clear and distinctive illustration of all the cases upon the principle on which the learned counsel for complainant seeks relief in this case. The facts are as widely different from the facts in this case as the sun from the earth, and the mere recital of the

facts in the case thus cited by the counsel, constitutes an argument against him.

And it is upon such authority as the foregoing that this complainant asks to be relieved from the force and effect of the pumping contracts and all the facts that followed on the faith thereof.

Upon such a slender excuse do they seek to avoid the contract which they continue to affirm: to take from the defendant Cleveland Company what they gave it under a contract which they do not even ask to be cancelled, but which they conclusively affirm: upon which they hold the consideration and benefits received by them under the contract, while denying to the defendant the same right.

And they make no offer of restoration.

But suppose the bill of complaint had been brought to annul the pumping contract and restore the parties upon the claim of a mutual mistake, or by any other reason. Such a bill would not be warranted by the authorities cited by complainant.

At the outset they would fail to show a mutual mistake.

The next failure would be in showing that the mistake claimed was a mistake upon which complainant had a right to rely, for it was a mistake of a kind which the very authorities cited by the learned counsel for complainant repeatedly declare can never form a basis for relief.

The mistake was in no way induced by the conduct of defendant. The defendant is absolutely innocent of any fraud or representation or misleading influence.

A further and insurmountable obstacle is the pumping contract: neither the complainant nor the

court could restore conditions existing before the contract.

(a) It could not restore to defendant the Cleveland Company ore and the territory comprised within the triangle, for the ore has been taken therefrom and the mine wrecked.

(b) It could not restore the waters to this lake where they were before the contract, without destroying three great mines, which subsequent to that contract have been opened in the lake bed and exposed to the inflow of water therefrom. One of these mines is in undisputed territory.

(c) It could not compel the three parties to join in a drainage contract on any different lines with any different boundary than that set forth therein: and it could not ask this court to make another contract to which none of the parties ever agreed: the court in a proper case may annul a contract and also in a proper case where its terms do not express the real contract, reform it so as to carry out the real agreement made, but there is no law otherwise warranting a court in interfering with a contract and changing its terms. There is no basis for reformation. The contract must stand as drawn or fall all together. Indeed if once this contract was annulled, each could insist on his original rights as riparian owner—that the lake should remain.

(d) The complainant could not take from defendant the territory north of the section line in which a great mine had been opened, and restore to defendant that which it has expended to-wit: the hazards of that undertaking. It is of no consequence, even if true, that defendant may have made a profit up to date on all the money expended. It is entitled to more: it is entitled to all the ore in that mine, for such is the

full value of the hazard undertaken by it on the faith of the agreement in question by the active consent and co-operation of the complainant.

If there were nothing else in the way, the simple, single fact that the court could not relieve the complainant of the consequences of this contract, and at the same time do full justice to the other party who has been innocent of wrong, and restore it to the position it would have been in if the contract had not been made, would bar the court from giving relief.

Ignorance of the law or a mistake as to a party's rights, will not protect one from a bar by estoppel, when but for such plea of ignorance the law would enforce the estoppel for acts and conduct, wheu to refuse to do so would be inequitable.

Tilton vs. Nelson, 27 Barb., 595;

Storrs vs. Barker, 6 Johns. Ch., 166;

Town vs. Needham, 3 Paige. Ch., 545 and 555.

Taking into consideration the conditions complainant was in before that contract was made, the circumstances which doubtless led to it, the discovery by complainant of a valuable mine south of the line, in which it would likely desire to have the entire benefit, with the certainty of having a valuable mine south of the line, and without knowledge that the territory north of that line had any value, it is clear that Mr. Kidder, on whose sole ideas the entire case of complainant is based, may well have thought his company would gain rather than lose by accepting Clute vs. Fisher as law. If therefore his acts and conduct had never been reduced to writing in a formal agreement, an estoppel would have as inevitably arisen as from the contract itself.

It is now open to complainant to claim in this court that Clute vs. Fisher did not establish the law, it was the privilege of complainant to do the same thing following its knowledge of that decision in 1888, precisely as was done in the case of Ice Co. vs. Ice Co., subsequently heard, in which the lower court held that Clute vs. Fisher was merely a dictum and not the law of Michigan.

When therefore complainant chose to act upon that decision at a time when it was vital to make the boundary line certain beyond cavil or dispute in the future, and proceeded to make the pumping contract and thereafter to actively encourage the Cleveland Company to treat the section line as a boundary, to expend its money in the hazardous enterprise of discovering a mine in that territory, upon the faith of that boundary, the complainant, by such action as solemnly adjudicated the rights of the respective parties as if it had brought a case at law and obtained the judgment of a lower court thereon for that purpose, sustaining if you please Clute vs. Fisher with which complainant was satisfied, and prosecuted no appeal.

The defendants never knew that Mr. Kidder supposed Clute vs. Fisher to be law, or that that case had any influence in leading complainant to join in the pumping contract and fix the respective boundaries and obligations, benefits and privileges of the respective parties with reference thereto.

There was nothing to show to either of the defendants that the complainant entered into the stipulations of the pumping contract and the previous negotiations and applications upon which it is based, for any other reason than to define the boundary, that each might thereafter be governed thereby.

It was not the case of Clute vs. Fisher, but the discovery of ore south of the line by complainant, and the belief of Mr. Kidder that ore did not exist north of that line, which led complainant to make that contract.

If Mr. Kidder really chose to believe, as he testified, that Clute vs. Fisher was probably the law, it was no greater error on his part and no more excusable in this case than would have been the mistake of a surveyor sent out by the respective parties to locate a boundary between them. In such case as the latter, acquiescence in the act of such a surveyor, though based wholly upon a mistake, would conclude all the parties forever, even though the mistake of the surveyor should afterwards be clearly shown.

All the questions flowing out of Clute vs. Fisher, so persistently invoked for complainant—whether it was or was not to be relied on as established in law; whether if it did it would be overturned at some future time; whether the boundary was a section line or an irregular, unascertained line in a practically undeterminable place in the lake to find which no court ever established a satisfactory rule; whether the boundary had already been fixed by patent or was open to settlement between the parties; and finally, whether it was desirable, on complainant's part, to fix upon any other line than the section line as a boundary; in other words, whether it did not then appear to complainant to be very desirable to fix the section line as a boundary for all purposes, whereby it would gain more than it would lose—all these questions were before the complainant when negotiations leading to the pumping contract were under way.

It is to cut off repudiation of a solemn agreement made under such circumstances, followed by such important, complete and unalterable changes in the position of the parties upon the strength of such an agreement, that the law of settlement of boundary, the law of estoppel by deed, the law of estoppel in pais, and every other kind of estoppel which may be urged, has arisen.

Finally, upon the question of permitting a mistake to interfere with an estoppel in pais, the very text from which the general principle was taken relied upon by the complainant, denies an application of the rule to plaintiff's case, in the following:

> "The rule has sometimes been stated as though it were universal that an actual knowledge of the truth is always indispensable (to effect an estoppel). It is however, subject to so many restrictions and limitations as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge would be charged to him. In such case ignorance or mistake will not prevent an estoppel. Nor does the rule apply to a party who has not simply acquiesced, but who has actively interfered by acts and words, and whose affirmative conduct has thus misled another. Finally, the rule does not apply even in cases of mere acquiescence, where the ignorance of the real fact was occasioned by culpable negligence."
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> Pomeroy's Eq., Vol. 2, Sec. 809.
>
> Sullivan vs. Colby, 71 Fed. Rep., 460, 465.

IV.

THE RECITALS OF THE PUMPING CONTRACT CONSTITUTE AN ESTOPPEL BY DEED.

A party is estopped from disputing his deed, even though he may not have understood its terms, and though a boundary described may have been wrong.

White vs. Smith, 37 Mich., 291.
Payne vs. Atterbury, Har. Ch., 414.
Thompson vs. Smith, 96 Mich., at p. 268.
Fahey vs. Marsh, 40 Mich., at p. 236, 240.

And this doctrine applies to particular and definite recitals in any instrument executed in the same manner as a deed, when such recitals are material facts in such instrument.

Bigelow on Estoppel, 4th Ed., 354.
Smith vs. Graham, 34 Mich., 302.
Kennedy vs. Brown, 61 Ala., 296:
Johnson vs. Thompson, 129 Mass., 398:
Bell vs. Todd, 51 Mich., 21:
Nivett vs. Berry, 5 Cranch, (Cir. Ct.), 291:
Dundas vs. Hitchcock, 12 How., 256.

The presentation of this proposition again brings to mind that the complainant occupies the unique position of attacking this contract while affirming it and relying upon it, that its bill is not framed for the purpose of attacking this contract, that it holds the consideration it has received under the contract: and finally, that in the very arguments of its counsel the stipulations relating to boundary are sought to be voided: not because they do not indicate what they mean and are therefore not sufficiently definite and certain, but because they were entered into by a "mutual mistake," which mutual mistake did not exist.

V.

UPON THE PRINCIPLE OF AN IMPLIED AGREEMENT THE COMPLAINANT IS BARRED FROM DISPUTING THIS BOUNDARY.

If a boundary between the adjoining owners was not fixed by the descriptions in the patent in so certain a manner as to leave no room for doubt, and if any kind of a doubt or dispute ever arose regarding that boundary, and afterwards the parties by the active conduct and acquiescence upon the part of one of them in assenting to a line claimed by the other in such a manner as to imply full assent thereto, followed by a change in the condition of the parties of such a character that neither can be allowed to disturb the arrangements without injustice to the other, the Court will estop both of them from disputing the boundary, upon the principle of a boundary settlement inferred by the court.

The fact that the boundary so acted upon is not the true one, the fact that it may have been fixed by a surveyor by reason of a mistake of that surveyor, it afterward appearing that the surveyor did make such a mistake, in no way interferes with the application of the principle.

Dibble vs. Rogers, 13 Wendell, 536.

If the agreement in writing did not exist under the acts of the parties following the time when that contract was executed, the signing of the petition to the common council by the superintendents, stating a boundary, an act fully ratified by complainant's conduct thereafter; the work of pumping the lake apportioning the expense thereof in the manner actually

followed, whereby the burden of continuous drainage was imposed solely upon the two defendants: the denial by complainant of any concern in the draining of the main portion of the lake bed or of any part of the lake bed north of the section line: the assumption by the complainant of a right following the time of the execution of the contract, to treat as its own property the territory comprised in the triangle: all these, and even any one of them, would be sufficient to impel an equity court, under the cases heretofore cited, to infer an agreement as binding and effective as the most solemnly executed covenant.

Upon this the learned judge of the court below, in deciding this case, well stated the position as follows:

> "If it is conceded, as urged by complainant's counsel, that the primary object of the parties in making the pumping contract was not to settle or dispose of any disputed question of riparian rights or boundary, still the question remains, was it not the intention of the parties to that instrument to so apportion the cost and expense of that work as to make the south line of section ten the boundary line? Was not this fact, that the south line of section ten was the boundary, made the basis of the contract in the apportionment of the expense and cost of that work? If so, was not this such an implied agreement and recognition of the line as fixed and established it within the language and the meaning of the Supreme Court in Manistee Mfg. Co. vs. Cogswell?
>
> "Is this not a fair test to apply: Would the defendants have entered into and made the contract on the terms therein contained, had the complainant claimed to them that it owned the territory now claimed lying north of the

> south line of section 10, and that it proposed to extend its line to the so-called equitable center of the lake? Most certainly not. There is ample reason to say that defendant would never have made this agreement had the complainant informed them that it claimed to own a large part of the most valuable portion of the land in the bed of the lake north of the south line of section 10."

But under the authority cited, wherein an agreement to settle a boundary has been inferred between the parties by their conduct, there are many other acts of these parties than those above mentioned, from which this court would have ample warrant to infer a settlement of the boundary.

The drilling operations conducted by defendant from the south line to reach the territory north of the line, and the consent of complainant and its active co-operation therein, would give rise to such an implied agreement.

The vast improvement made by the Cleveland Company north of that line in creating a mine structure in the bowels of the earth, at least one-half of which was in solid rock, with chambers more than half a mile in length—all this with the consent and active encouragement of complainant and the knowledge that it was based upon the belief by the Cleveland Company in the full consent of complainant to the section line as a boundary, would constitute such an implied agreement.

So would the leasing to complainant of ground for a railroad track over the disputed territory.

So would the mutual settlements for trespasses across that section line, with the accompanying maps marking the line as a boundary.

So also to the same end would be those acts of complainant and defendant the Cleveland Company in driving nails in the timber structure under that section line, on two different occasions, once in 1895 and again in 1896, to mark it as a boundary.

In Deihl vs. Zanger, 39 Mich. 605, the parties had not themselves fixed a boundary line, but had acquiesced in the existence of a fence as apparently marking the boundary and which they had treated as such; upon such facts Cooley, J., at p. 600, citing the doctrine of Smith vs. Hamilton in support of the statement, held the party estopped to question the boundary upon the ground that

> "Long practical acquiescence of the parties concerned in supposed boundary lines should be regarded as such an agreement, upon them as should be conclusive, even if originally located erroneously."

In Jones vs. Pashby, 62 Mich., where the true division line was in dispute, but where no question of estoppel appears to have been considered by the trial court, the court said at page 625:

> "There was evidence introduced upon both sides tending to show an actual location of the boundary line * * this testimony should have been submitted to the jury (on the question whether the line had been so fixed to estop inquiry) * * If no agreement of practical construction had been put upon the deed in applying it to the subject matter by the owners then the division line which would divide the whole tract in two equal parts in quantity should govern."

In the same case, afterward tried and again reaching the Supreme Court, reported in 67 Mich., 459, the

court held that an occupancy with reference to and recognition for eight years of boundary was such, in character (though it seemed to rest upon acts implying only, an agreement) that an agreement to fix the boundary appeared almost conclusive. The court further held that the deed having left the meaning of the grantor so ambiguous that the true line had to be settled in court, therefore

> "Both parties might well be in doubt as to where the line was located by such deed and therefore in order to settle such doubts they were authorized to meet and agree where a boundary line should be."

In Dupont vs. Starring, 42 Mich., 492, the action was trespass and the facts showed that while one party claimed a certain line as the boundary and made improvements accordingly, the other party appeared to have assented thereto; upon this fact Cooley, J. said:

> "It has been repeatedly held by this court that a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new survey."
> Smith vs. Hamilton and other cases.

The question then occurred to the court whether the evidence was sufficient to support the contention that the plaintiff was estopped by conduct amounting to an agreement to fix a boundary line, and commenting on such evidence on which the jury found in favor of the defendant that such an agreement was made or acquiesced in, said: (p. 494.)

> "We have had some doubt whether the special findings in this case were sufficient to show that there had been a claim on the part of the defendant of the old fence as the true

> boundary line and an acquiescence in this claim by the plaintiff's grantors for the period named, * * * but as the establishment of a line by claim and acquiescence appears from the record to have been a subject of dispute on the trial we do not doubt that the jury supposed their special findings covered the case."

The foregoing language is important only because the principle of the case involved was that now under discussion and not the principle of a bar by adverse possession for the statutory period.

In Manistee Manufacturing Company vs. Cogswell. 103 Mich., 602, there was a claim that a boundary had been established by agreement and acquiesced in by the parties by the making of improvements with reference thereto. The case was ejectment and the court took the case from the jury and directed a verdict for defendant on the ground that it conclusively appeared such an agreement had been made and acquiesced in. The evidence quoted at some length does not show an agreement at all, but acts and conversations from which the Supreme Court seemed to think such an agreement might well be inferred, and while holding it was not *conclusive*, held that it should have been submitted to a jury. In so doing the court said: (p. 605.)

> "The question presented is, whether the testimony conclusively shows that the parties intended that the line as *established* by defendants should be treated as the true line * * * if the jury had found as a matter of fact that the plaintiff intended to assent to the line fixed by defendant's building, there may be enough in the testimony to support such a finding; but this is far from saying that the fact conclusively appears. We have no doubt that defendants have a right to make this defense in a suit at

law. Hayes vs. Livingston, 34 Mich., 384; but mere non-interference with the defendant's occupancy is not enough to constitute a defense until such occupancy has ripened into a title by adverse possession unless there has been some agreement expressed or implied fixing the line in which case acquiescence for a less period than 15 years is sufficient * * * and which has been followed by a change in the condition of the parties made on the strength of such acquiescence is sufficient.

Smith vs. Hamilton, 20 Mich., 433.
Joyce vs. Williams, 26 Id., 332.
Cronin vs. Gore, 38 Id., 381.
Bird vs. Starke, 66 Id., 654.
Jones vs. Pashby, 67 Id., 459.

In support of the rule as stated in the quotation from Manistee Manufacturing Co. vs. Cogswell that where no express agreement is shown, acquiescence by one party in a line assumed by the other to such extent as to imply assent thereto, is sufficient to imply an agreement and will constitute the bar, our court cites:

Kellogg vs. Smith, 7 Cush., 376.
(Approved in Smith vs. Hamilton.)
Rockwell vs. Adams, 6 Wend., 467.
Dibble vs. Rogers, 13 Wend., 536.

In Dibble vs. Rogers, 13 Wend., 536, there was evidence of a long acquiescence in the location of a boundary line which appeared on the trial to have been erroneously located. No agreement fixing the line as the boundary line appeared in evidence, but there were acts and declarations of the parties showing an acquiescence therein. The trial court, as was held properly, instructed the jury that, (p. 539.)

"A long acquiescence in an erroneous location by the plaintiff authorized the jury to find

> that the plaintiff had agreed to a location different from that given by his deed; and whether he knew his rights or not such location or acquiescence would conclude him; and that if the jury were satisfied that the plaintiff had agreed to such location, of which his long acquiescence in the location contended for by the defendants was evidence, that they would find for the defendants."

The court further held that acts and declarations of the parties are competent evidence upon the question of location; that their admission does not conflict with the principle that a man shall not be divested of his title to land by parol.

VI.

IN THIS EQUITY COURT, COMPLAINANT IS ESTOPPED BY MATTER IN PAIS.

At law, estoppel in pais cannot bar a legal right or be used to affect permanent interests in land, but in equity it is as effectual in the case of a boundary, as that meeting and agreeing on an uncertain boundary which forms the subject of subdivision V.

Estoppel *in pais* is the enforcement of that principle that one shall not be heard to deny that, as a fact, which his conduct has led another to believe existed when the latter has acted in accordance with that belief.

The principle has been asserted in actions of ejectment and trespass in this state where it has been confounded with cases of "settlement of boundaries."

It has been repeatedly held to be a defense *in equity* to actions for the recovery of land.

Smith vs. Hamilton, Supra, last paragraph.
Hayes vs. Livingston, 34 Mich., 384.
Baldwin vs. Brown, 16 N. Y., at p. 364.
Terry vs. Chandler, 16 N. Y., 354, where the distinctions are pointed out.
St. Louis N. S. Co. vs. Wiggins F. Co., 102 Ill., 514.
S. C., 112 Ill., 384.
Winslow vs. Cooper, 104 Ill., 236.
Blake vs. Fask, 44 Ill,, 302.
Adams vs. Rockwell, 16 Wend., 285.
Morgan vs. Railway, 96 U. S., 716.
Tilton vs. Nelson, 27 Barb., 595.
Storrs vs. Barker, 6 Johns. Ch., 166.
Town vs. Needham, 3 Paige Ch., 555.
Dickerson vs. Colgrove, 100 U. S., pp. 578 and tp. p. 580.
Clegg vs. Edmondson, 8 Deg. M. and G., 787-808.
Twin Lick Oil Co. vs. Marbury, 91 U. S., 592, 593.

These last cases hold that profit made by the defendant after hazardous expenditures, do not help plaintiff.

In Smith vs. Hamilton, Judge Campbell merely alluded in the closing paragraph of the opinion to the enforcement in equity of an estoppel differing from the kind involved in that case.

In Hayes vs. Livingston, Chief Justice Cooley, while denying the right of a defendant to recover in ejectment a judgment on the strength of an estoppel in pais, not only approved a long line of autohrities

holding such a defense perfect to affect a permanent interest or title in land, but said further: (p. 394.)

> "Estoppels relating to real estate so far as we can find have been uniformly enforced in courts of equity and usually by injunction: and this is manifestly in accordance with the analogies of the laws.

Again: (p. 390.)

> "Equity may always compel the owner of the title to release it where that is the proper redress for a fraud committed by him in respect to the title: but the remedy is properly administered by compelling the fraudulent owner to convey instead of treating the case as one of estoppel in the strict sense.

Again: (p. 395.)

> "Whatever may be the reasons, and whether satisfactory to ourselves or not, we are not at liberty to disregard the fact that the legislation of the state still leaves equitable claims to be tried in the courts of equity. And when one asserts that the owner of land ought to surrender it to him because of the owner's fraudulent acts and conduct, it is manifest that this claim is only an equitable claim set up and asserted against the legal claim. The one has the legal title, and the other seeks to overthrow it by proving a superior equity. This he may be able to do in a court of equity, but we cannot admit that at law the legal title is not entitled to prevail."

In Morgan vs. Railway Company, the company was engaged in locating a railroad in Illinois. Morgan was in its service as an engineer in locating the lines, stations, etc. With a view to locating a station and laying out a town, Morgan and others bought four

parcels of land, made a map of the town site and represented thereon as "railway company's land" a certain depot site, but to which as a matter of fact no title was conveyed to the company. While the title remained in Morgan the company proceeded to build the station on the land to which Morgan made no objection. Afterwards Morgan filed a bill to settle the title to the property to which the railway company interposed a defense that Morgan was estopped from claiming the title by his acquiescence when he ought to have spoken.

The court held that the facts established a defense in equity: that the depot would not have been built upon the premises if any doubt had been entertained as to the ownership by the company: that it would have been a fraud on the part of Morgan to stand by in silence and see it erected under such circumstances, if he could then defeat title. That it was not necessary in barring Morgan's claim to decide whether estoppel in pais passed the legal title by inurement. The court recognized the fact that the courts of this country are not in harmony on the proposition that estoppel in pais can actually convey title the same as in a case of estoppel by deed.

In Norfolk & W. Ry. Co. vs. Perdue, 40 W. Va., 442, it was held that one claiming to be the owner of a tract of land who had notice that a railway company was proceeding to excavate a tunnel through a mountain located on said land, under claim of title thereto, and remained silent as to his ownership and assisted in constructing the tunnel until its completion, and then brought an action for damages, was estopped from recovering in said action and enjoined from further prosecuting such action. The court held the

principle that when one or two innocent persons, each guiltless of any intentional or moral wrong, must suffer a loss, it must be borne by that one of them, who by his conduct, acts, or omission to act, has rendered the injury possible. See also

Herman on Estoppel, 776:

Pickard vs. Sears, 6 Adol. & E., 469.

In the case already referred to of Twin Lick Oil Co. vs. Marbury, 91 U. S., 592-3, the court estopped the complainant party from litigating a title to land valuable only for mining purposes, who had stood by and witnessed its development by defendant, claiming title. The facts in that case and the well reasoned opinion thereon, are particularly applicable here.

In Clegg vs. Edmondson the complainant had been a partner of the defendant in the leasing of mining property as a business. It had been agreed between them that if either should obtain a lease of mining property, the other should be admitted to a partnership interest therein. The defendant procured such a lease of a mine property, which had been partly developed, and thereunder proceeded to complete the development thereof, and at much hazard and after considerable expenditure, developed a mine property of great value, during which time, for a period of about nine years, the complainant, while protesting he was entitled to share therein, brought no suit. The court, (per Lord Justice Turner), in delivering its opinion cutting off the complainant by an estoppel said: (807-808).

> "We have to consider then, the question of delay and acquiescence and in determining the effect due to these considerations, we must take into account both the nature of the right which

is claimed and of the property in which it is claimed. * * *

"It was said, indeed, on the part of the plaintiff that these mines had been tried and that there was no uncertainty attaching to the value of them, but I do not find from the evidence that they had been explored to any such extent as could render their value certain and, on the contrary, the evidence shows that faults were met with in the working under the new lease and the expense of the workings would, of course, depend upon the nature and extent of these faults. What expenditure they would occasion or to what extent they would affect the value of the mines could not of course be foreseen. If they had led to ruinous expenditure and had rendered the mines unproductive, nothing would of course have been heard of this claim of plaintiff's, and there would have been no claim against them. Are they then, in justice, entitled to reap the benefit when they could not have been made subject to the loss? It is said for the plaintiff that the expenditure has been more than met by the profits, but this does not seem to me to vary the case, for the profits justly belonged wholly to the lessees unless the plaintiff was entitled to share in them and to assume that the lessees were not expending their own money would be to assume that the plaintiffs were so entitled which is the very question we have to decide."

See also Pendergast vs. Turton, 1 You. & Coll. Ch. 97.

It is contended by counsel for complainant that there can be no estoppel in pais in such a case, unless the element of fraud exists; citing Henshaw vs. Bissell, 18 Wall. 255, Brant vs. Virginia Coal & Iron Co., 93 U. S., 326.

Henshaw vs. Bissell presents the case of conflicting claims under floating Mexican land grants. Under the floating grant the plaintiff selected a claim in a certain locality, and was satisfied to hold by the boundaries of that selection. But the government, through its appropriate officers, interfered and asserted that another and different location was required by the grant. Because of the plaintiff's conduct, based on this action of the government in holding to one of these parcels rather than the other, and claiming his boundary line for a long time to have been that which the government compelled him to take, the other party asserted an estoppel against him. On such facts the court held that equitable estoppel, such as would prevent him from obtaining his legal rights in the land, could not be asserted, because "there must generally be some degree of turpitude in his conduct which has misled others to their injury." The facts passed on by the court in that case do not warrant any other statement of legal principle applicable thereto.

In Brant vs. Va. Coal & Iron Co. the plaintiff brought an action, claiming title to certain land occupied by the Virginia Coal & Iron Company which the latter occupied and claimed under a foreclosure sale wrongfully made. The mortgage had been executed to a widow claiming under a will, upon the sale by her of the property and in consideration of the purchase price. But the widow had no such right as she claimed under the will, the property under the law belonging to other heirs whose interest the plaintiff had purchased. The plaintiff was in no way a party to the mortgage or its foreclosure, and he had done no act and made no declaration at any time claimed by the defendant to

have affected in any way its title or claim of title. The defendant, nevertheless, pleaded estoppel against the plaintiff. But the court held that the foreclosure proceedings did not estop the plaintiff: that to estop in any view of the case, the defense must show that his language or conduct was the direct motive or inducement to the purchase. This was sufficient to decide the case, but the court proceeded further to say that no estoppel will arise in the absence of actual fraud, unless the purchaser was not only ignorant of the true state of the title, but had no means of acquiring knowledge by a recourse to the record. But the court, recognizing the principle pertinent to the case at bar, said "it is a principle of universal application that a person assenting to an act and deriving and enjoying title under it," (for title read benefits, immunity from cost, and the triangle) "shall not be permitted to impeach it."

See case cited by counsel for complainant, pp. 330, 331.

In Freeman vs. Cooke, 2 Ex., 654, Parke, B., referring to the word "willfully," as used in Pickard vs. Seares, says:

> "If, whatever a man's intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth. In short, the representations are to be regarded as 'willful' when the person making them meant them to be acted upon, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act upon it."

Herman on Estoppel, after quoting the above in Sec. 754, says:

> "The word 'willful,' as used in this connection, is not to be taken in the limited sense of the term 'maliciously' or of the term 'fraudulently,' nor does it of necessity imply any active desire to produce a particular impression or to induce a particular line of conduct. Whatever may be the motive one who so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his conduct, is legally chargeable with an intent or willful design to induce the other to believe him, and to act upon that belief, if such prove to be the actual result."

The same author, in Sec. 772, says:

> "It is not necessary, in order to the existence of an equitable estoppel, that there should exist a design to deceive or defraud. The person against whom the estoppel is asserted must, by his silence or his representations, have created a belief in the existence of a state of facts, which it would be unconscionable to deny, but it is not essential that he should have been guilty of positive fraud in his previous conduct. Nor is it essential that there should in all cases be an intention to deceive, or even a knowledge that the representation was false."

In Pickard vs. Sears, Lord Denman, in declaring the rule of law governing estoppels in pais concerning conduct which counsel for complainant asserts must show actual fraud in the party to be estopped, says:

> "The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act upon that belief

> so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the time."

Commenting on that opinion, Miller, J., in Boardman vs. Ry. Co., 84 N. Y., 182, adds:

> "Nor is it essential to an equitable estoppel that the party should design to mislead. And it is sufficient if his acts were calculated to mislead and have misled another acting upon it in good faith and exercising reasonable care."

So that intentional fraud is wholly unnecessary in a party against whom estoppel is enforced. It is sufficient if the circumstances are such that it amount to a fraud to allow him to assert a right. His original acts and conduct upon which estoppel is applied, may have been innocent of any wrong intent. It is sufficient that legal fraud should result in case he is permitted in his suit to overturn his original action and deprive another of advantages and benefits and improvements made on the faith of the former action. And this is the doctrine of the courts of this state.

Thus Cooley, J., in Ferguson vs. Milliken, 42 Mich., 443, says: "Estoppels rest upon the protection of equities."

But it is further asserted in behalf of complainant as against the application of the principle of estoppel in pais to bar this action, that defendant, the Cleveland Iron Mining Company, has not been injured, but on the other hand has made a profit by its transactions in the disputed territory.

The attempt in the brief for complainant to show this profit is labored, like the testimony of complainant's employes upon which the argument is based. On

complainant's side on the hearing, the testimony regarding this profit was all based upon estimates on assumed states of fact, and upon comparisons with certain kinds of cost of mining ore in the mine of complainant.

On defendant's side it was shown that these estimates were wild; that the actual cost for driving the long drift through the rock, mentioned in the evidence, was nearly, if not quite, double what the witnesses for complainant had estimated such a drift would cost.

Whereas, also, complainant's witnesses assumed all the openings made by defendant in the territory on the south line were in ore, the actual fact was developed, without contradiction, that one-half of all these drifts and levels were in solid rock. It appeared that the ore taken out of a drift driven wholly in ore, would pay the cost of the drift; that this would not pay for the drifts run through solid rock, which were of course wholly outgo.

But what if plaintiff did make a profit on ore mined from the disputed territory, over and above the cost of that particular work? Profit has nothing to do with the case.

The equity involved in the proposition here discussed may be simply stated thus: When the defendant, acting upon the faith of the pumping contract, or upon the faith of an agreement preceding that contract, or upon the faith of an agreement implied from that contract with all the others in testimony, proceeded at great hazard to explore the territory in question, and after the discovery of ore proceeded at further great hazard and expense to develop the find, in order to determine whether it had value or not, it became entitled as against the plaintiff to every pound of ore

and everything of value existing in that territory, discovered at its own hazard and expense. Such only can be the full compensation to one who is entitled to any consideration whatever for his hazard. Though that mine may exist a thousand years, the defendant is entitled to the whole of it.

It was the money of defendant only, that was expended in its development. If nothing had resulted, the defendant would have suffered a loss of many thousand dollars. The complainant would not have shared in that loss: and complainant is not entitled now to reap the benefits or any benefit whatever. The opinion of Lord Justice Turner in Clegg vs. Edmonson is a complete answer to the argument of complainant based on the alleged profit realized by the defendant.

But complainant contends in this same line that defendant is not entitled to the full equity claimed by it for the hazards of its discovery and development of a mine in the disputed territory. The complainant contends that its own officers informed Agent Mills of the defendant company of the probable existence of ore north of the line in the summer of 1892, and complainant insists upon this fact it is entitled to some credit and equitable consideration as against the claim of defendant. But why? The claim of the complainant is absurd. It is true its officers called the attention of Mr. Mills to the fact that the deposit of complainant in the southeast arm would probably extend north of the line into defendant's territory. This was in the summer of 1892, after the pumping contract had been executed and the lake was already in process of drainage thereunder. That contract had been made to protect the complainant in taking the ore from the triangle and everything south of the line, and to protect the

defendants in the discovery and development of everything north of the line.

Further, that ore existed in the territory north of the line was but the first symptom of value, and not proof of it at all. Complainant's own experience with its mine in the southeast arm, is conclusive evidence that the mere existence of iron ore is not a proof of its value. For after the defendants discovered the ore in 1889, it sunk a shaft occupying many months in construction; and even after that shaft was bottomed in iron ore, complainant conducted development work for nearly a year thereafter, for the sole purpose of assuring itself of the extent of value there discovered.

Though defendant was told by complainant that ore existed north of the line in the summer of 1892, it at great expense put down ten diamond drill borings to discover such ore. Evidently such work was not mere idle child's play, but a serious effort to discover.

It was after all these borings that the defendant commenced and continued for a year the work of constructing the long rock drift from the north to the south side, to reach the supposed deposit. This was also purely investigation.

And it is significant that as late as the time when this rock drift was in process of construction by defendant, the complainant's mining superintendent believed it promised too small a result to warrant the undertaking. He represented to defendant's agent that he believed the entire result of all explorations there would discover so small a quantity of ore that defendant would not be repaid for the trouble of that drift, and advised Mills to let the complainant company have the comparatively small quantity of ore, which might possibly be found there, as it could be

cheaply mined from the south side of the line through complainant's shaft.

Walters, p. 133.

It is clear therefore from complainant's own testimony that after investigation commenced by defendant, the enterprise seemed hazardous for at least two years, though investigation at great expense continued without interruption.

It was not in fact until the summer of 1896 that the deposit in question assumed large proportions. On July 2, 1896, Mr. Bradt, complainant's engineer, accompanied the engineer of defendant Cleveland Company on a visit to defendant's work, and upon observing the great development at that time, expressed surprise at the extent of it.

Jopling, p. 207.

It was this awakening on July 2, 1896, to the real value of the development by defendant in that territory, and not Clute vs. Fisher, or any other cause urged by complainant, which led to this suit.

But it is idle for complainant to cite authorities to prevent an estoppel in pais against complainant under the circumstances of this case. A more inequitable attempt could not be conceived of than the undertaking in this suit.

No authority cited among the numerous cases in the briefs for complainant, supports the proposition that the Angeline Company can hold to the pumping contract, have the triangle and retain the benefits and prosecute this suit: that it can ask successfully for equitable relief in an attempt to procure property made valuable solely by the hazard, the enterprise, and the expenditures of the defendant: that it can trample upon the contract which it has solemnly

affirmed in this very case: and that after having wrecked and destroyed the property in the triangle, a right to which it undeniably obtained by virtue of the agreement between these parties, it can ask to receive from defendant all that defendant likewise obtained under the same agreement.

There is not the slightest evidence developed by the facts in this case of equitable conduct at any period of the history thereof in its treatment of the defendant. It delayed for a period of eight months after Mr. Kidder had been fully advised of the case of Ice Co. vs. Ice Co. and its effect upon its interests, to even notify the defendant companies of his change of front.

The truth is complainant did not change its front until the surprising discovery made by its engineer on July 2, 1896.

On the contrary, though advised by Mr. Clark, as claimed by Mr. Kidder, on February 8, 1896, of the effect of the case of Ice Co. vs. Ice Co. on the former advice which Mr. Kidder claims he received from his counsel and though he immediately thereon conferred with his superior officers upon the situation, the complainant carefully refrained from giving notice of any kind to the defendant the Cleveland Company, or interfering with or interrupting for a single moment of time the constant work of exploration and development then being carried on by the defendant with a full knowledge thereof of complainant's officers. In June, 1896, Mr. Kidder actually negotiated with the defendant company for a formal lease of a right of way across the now disputed territory for his railroad track.

Jopling, pp. 207-208.

That railroad track and embankment had been

completed during the winter of 1895-6, under a previous grant of right by the Cleveland Company, and in June, 1896, it was being operated by complainant company, and it has continued to occupy and operate that railroad track to this day.

In the month of September, Mr. Kidder had further talk with defendant's manager at that time, with reference to that same lease. Did he then caution defendant to do no further work, of development in that territory? Did he say complainant company had previously been deceived as to its rights and proposed to claim them. Not one word. He merely said he was not quite ready yet to close a formal written lease for the railroad track, without giving a reason.

Jopling, p. 208.

In the same month of September, on the 14th day of that month, Mr. Kidder had a further conversation with defendant's manager, in which complainant requested the defendant to arrange to leave a certain block of ore under the section line, in the bed of the lake between their two lines as divided by the section line, to accommodate complainant company and prevent complainant from losing a portion of its ore, should the defendant not grant the accommodation.

Jopling, p. 209; and Map, Def. Ex. 24, at p. 210.

Not until November following did Mr. Kidder post a notice directed to Mr. Mather, president of the Cleveland Company, giving the first intimation of complainant's present attitude. And the fact will be remembered (it is referred to in the statement of facts), that Mr. Kidder remarked, on posting this notice, that Mr. Mather would be very much surprised when he received it.

VII.

THEREFORE, COMPLAINT IS ESTOPPED BY ITS LACHES FROM THE FIRST DAY OF MARCH TO THE FIRST DAY OF NOVEMBER, 1896, FROM MAKING A CLAIM IN THIS SUIT.

The failure of a party to assert a right while another party in good faith goes on to make the property more valuable, cuts him off by his laches from afterwards claiming such right.

Twin Lick Oil Co. vs. Marbury, 91 U. S., 587.
Royal Bank vs. Grand Trunk Ry., 125 Mass., 490.
Clegg vs. Edmonson, 8 DeG. M. & G., 787.
Pendergast vs. Turton, 1 You. & Coll. Ch., 97.

For the sake of argument let the pumping contract and all the facts pertaining thereto be blotted out. Take from the case the triangle south of the line, used and wrecked by complainant, and which it does not offer to and cannot restore; and all the work done by the Cleveland Company in this territory prior to March, 1896; and all the acts and conduct of the several parties prior to that date, and start complainant with a clean record on the 8th day of February, 1896, when by Mr. Kidder's own claim he was advised of his alleged rights under Ice Co. vs. Ice Co., if he ever had any such.

There is yet enough in the conduct of complainant company following that date to deprive it of a remedy.

Mr. Kidder testified that when he was informed in the year 1887 or 1888 of the case of Clute vs. Fisher, and having decided to act upon that case, he immedi-

ately removed to the south of the line, the buildings erected by his company upon the ground made north of the section line between complainant and the Lake Superior Iron Company. He does not appear to have consulted his superior officers with reference to that immediate movement. He explained in his testimony already referred to, that he thus acted promptly to save his rights in case Clute vs. Fisher should turn out to be the law of the state and should not be overturned.

Why did not Mr. Kidder act with equal promptness on February 8, 1896, in advising the defendant Cleveland Company of a change of positions and a change in his belief?

His own previous action in 1887 concludes him upon any claim which might be made that he did not understand the propriety of immediate action to save rights involved.

Why should he not have been as fair in his treatment of the Cleveland Company in 1896 as he was in the treatment of his own company in 1887?

He knew that the Cleveland Company was continuing every day the work of development in the now disputed territory. He knew that every week of time might develop great changes in values under the influence of that development work. He knew the hazards of mine development at the expense of the Cleveland Iron Mining Company were still continuing. He not only took no steps to treat them fairly under the influence of his full and complete information on the situation, but if anything could lead the Cleveland Company to fancy itself absolutely secure in its work, the conduct of Mr. Kidder during that period of time up to November following, was well calculated to do so.

Did the complainant company delay because it

had not yet been advised that the Cleveland Company had developed anything of value worth fighting for?

The considerations presented in the Marbury case, with such overwhelming force as to inspire conviction, may be again applied under this subdivision to characterize the conduct of the complainant company during the time in question as so inequitable and unfair, in view of its present effort by this bill, as to conclusively bar it from relief.

The principle, that he who seeks equity must do equity, has been entirely ignored in the bringing of this bill.

And with such a load of equities on the part of the defendant to overcome, without presenting on his own side a single equity or one single effort to do equity, what is it which the complainant asks this court to do. When the lake was full of water in its original condition it would have been difficult for any court to find a boundary in the lake. By the continuous acts of the shore owners during several years, the waters of the lake were gradually lowered, so that the actual knowledge of the original shore lines does not now seem to remain in the mind of any living witness. On finally draining the lake, in 1892 shore lines in many places were so obliterated that it is impossible now to find them with any degree of certainty.

In the original condition of this lake, when the soil in its bed was virgin and untouched, it would have been practically impossible for a court to do justice to all parties in undertaking to divide that lake bed with reference to its original shore line. In that bed are many ore veins, with vast fields of worthless rock. By the method invoked by complainant for dividing that lake bed, any attempted division of it could scarcely

fail to do injustice to one or the other of the parties, where a single acre or half acre might be worth all the other acres together.

How much more arbitrary, uncertain and unjust does such a method now appear, when a court is first asked to take it, with the present conditions.

VIII.

It is persistently urged by complainant that the acts and conduct of complainant's officers were without authority to convey any interest in land, because of the statute in Michigan requiring the vote of three-fifths of the capital stock to make a conveyance of corporate property valid. This objection is even applied to the pumping agreement.

The learned counsel for complainant contends that even a seal on the pumping agreement does not import that it was the seal of the corporation, and that what purports to be a seal attached to a corporate contract does not estop the corporation from challenging the power of the officers to make the contract.

The point is made in behalf of complainant with singular oblivion to the fact that the agreement in question was put in evidence by complainant in this case, which fact proves the seal, the authority of the officers to make the contract, and estops the complainant from attacking it for any cause whatever, as the contract which it purports to be and duly authorized for that purpose.

It seems needless to cite authority to such a proposition.

But further, the entire argument of complainant upon the proposition considered, is foreign to the cir-

cumstances to which the proposition is applied. The conveyance of corporate property by deed is one thing, an estoppel upon that corporation by its acts and conduct in a suit in equity brought by it to obtain relief is an entirely different matter.

Complainant's local officers were put in possession of its property with apparent authority to do all things in which conduct could affect the rights and obligations of complainant company.

One is estopped by the act of his agent from denying the authority of that agent in the doing of such acts, the making of such admissions as come within apparent scope of the authority of such agent.

McCormick vs. Bay City, 23 Mich. 457;
Brown vs. Kent, Probate Judge, 42 Mich. 501.

In Butler vs. Iron Cliffs Co., 96 Mich. 70, a contract existing solely in letters and oral conversations of the president of a mining corporation, was held sufficient upon which to compel the conveyance by the corporation of its lands, the complainant in the case having paid his money therefor. And there was no proof of the authority of the president in that case to act.

Sufficient authority of an agent is always presumed when the facts are such from long continuance that the principal must have been supposed to have full knowledge thereof and the benefits of whose act he has received and failed to return. In such a case ratification will be presumed. Acquiescence is a substitute for knowledge of the fact, and knowledge with acquiescence amounts to ratification.

Columbet vs. Pacheco, 48 Cal. 395;
Chicago &c. Ry. vs. People, 91 Ill. 251;
Diehl vs. Zanger, 39 Mich. 601.

It seems idle to be compelled to argue that the complainant knew of all the acts of its officers and ratified them, for it received the benefits therefrom.

It seems idle also to argue the question at all, because the question now arises whether a complainant can obtain relief in equity to escape the enforcements against it of contracts and conduct of its officers thereunder, while it neither offers to restore nor point out how it could be able to restore the other party to its former condition, the changes in conditions having been brought about by the contracts and acts fully ratified by the complainant now seeking to attack them.

Whether or not referable to the pumping agreement in explicit terms, nevertheless the subsequent acts of complainant's officers, their declarations, tresspass settlements, map making, mining of iron ore from the triangle, obtaining railroad right of way—all these were done and declared and had effect thereby, under the sanction of that contract with full knowledge of the complainant of the fact.

IX

Complainant is barred from maintaining this action because having obtained and now occupying disputed territory under a lease from defendant, it is estopped from disputing defendant's title.

Taylor Landlord and Tenant (7th Ed.) secs. 629, 705.

Under the lease obtained from defendant for a right of way, the complainant company is now actually in occupancy of the disputed territory. And the admission in that lease of defendant's title to that

portion actually occupied, extends to every portion of the territory occupied under the same title.

The Circuit Court, without passing on the other questions in this case, held the complainant estopped to claim this land, and we append hereto the opinion delivered there. Quite a few of the authorities cited by the court we have not again cited and we adopt the opinion of the court as a part of our argument on the question of estoppel. It presents strong and cogent reasons why the complainant's bill should be dismissed.

THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE, IN CHANCERY.

The Pittsburgh & Lake Angeline Iron Company,
Complainant,

vs.

The Cleveland Iron Mining Company, and The Lake Superior Iron Co.,
Defendants.

In disposing of this case I shall first discuss and determine the question of estoppel, for if the complainant is estopped to now set up title in itself to the lands lying north of the south line of Section 10, the other questions become unimportant. Is the complainant estopped by its undisputed acts, conduct, silence and acquiescence in the premises? The maxim that "where one of the two parties, neither of whom has acted dishonestly, must suffer, he shall suffer who by his own act has occasioned the confidence and consequent injury of the other," applies, it is urged by the defend-

ants, to the complainant here. It is urged that the complainant allowed the defendants to go on and expend large sums of money to explore for iron ore in the bed of this lake, upon the understanding that the bed of the lake north of the south line of Section 10, where such exploring was done, belonged to them and not the complainant, and that the defendants would be entitled to remove the ore which should there be found. And it is said that the question here is not whether the legal title to the bed of the lake passed to the defendants by the acts which it is claimed constitute the estoppel, but that the question here is, upon a bill in equity filed by the complainant for the purpose of making available to itself the benefits of the explorations and improvements which have been made by the defendants, upon the understanding with the complainant that these explorations and improvements were carried on for the benefit of the defendants, upon lands to which the complainant made no claim of title.

And it is urged by the defendants that for the complainant to change its position now, after the explorations and expenditures have been made and the ore discovered, by seeking to appropriate the fruits of such explorations, expenditures and discovery, and deprive the defendants of the benefits thereof, is to work a fraud upon them, which a court of equity will not help it to accomplish. It seems to be the law that a party will not be permitted to recover lands which he has encouraged another to occupy and improve, even when the encouragement was given under the influence of a mistake and in ignorance of his own better right.

2 Herman on Estoppel, sec. 954.

And cases cited in note 4.

I do not think that it is necessary to find that any actual fraud has been practiced by the complainant, in order to apply the doctrine of equitable estoppel to its conduct.

A party is estopped from contradicting his own representations, on the strength of which another has acted, even where such representation was made in good faith, and in ignorance of the facts.

Sweezy vs. Collins, 40 Iowa, 540.

Ignorance of the law, or a mistake as to the party's rights, will not protect one from a bar by estoppel, when, but for such plea of ignorance the law would enforce the estoppel for acts and conduct, when to refuse to do so would be inequitable.

Tilton vs. Nelson, 27 Barb., 595.

Storrs vs. Baker, 6 Johns. Ch. 166.

Town vs. Needham, 3 Paige, 555.

The question is not did the complainant practice a fraud upon the defendants in leading them to believe that it would not, and did not claim any land lying north of the south line of section 10, but it seems to me rather that the question is, whether the complainant would now be guilty of a fraud in making such claim, in view of all that has been said and done upon that subject, and in view of the course of dealing between the parties for years respecting that territory.

As Herman says, at section 736:

> "The fundamental principle upon which this doctrine is based is the equitable one, the suppression of fraud and the enforcement of honesty and fair dealing. The ground upon which a party is estopped from proving that his representations, on which another has acted, were false, is that to permit it is contrary to equity and good conscience."

Again at section 759:

> "If a man, either in express terms, or by conduct, makes a representation to another of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

Then again:

> "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."

Section 762:

> "The exclusive warrant for an equitable estoppel is, that it is necessary to sustain the cause of right and justice. Where the acts and representations of a party must have influenced the other to do acts which he would not have otherwise done, and where a denial or repudiation must operate to the injury of such other party, the estoppel is created."

The above equitable doctrine is nowhere more clearly stated than by Cooley, J., in Furguson vs. Milliken, 42 Mich. 443: "Estoppels rest upon the protection of equities." In many cases the word willful is used, as though the representations or acts of the party must have been made willfully or with intent to deceive. That was the term used in one of the leading cases—Pickard vs. Seares.

In Freeman vs. Cooke, 2 Ex. 654, Parke B. referring to "willfully" as used in Pickard vs. Seares, said:

> "If, whatever a man's intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant that he should act upon it, and he did act upon it as true, the party making the representations would be equally precluded from contesting its truth. In short, the representations are to be regarded as 'willful' when the person making them meant them to be acted upon, or if, without regard to intention he so conducts himself that a reasonable man would take the representations to be true, and believe it was meant he should act upon it.' See also Herman, Secs. 754 and 772 on the same subject.

All that is essential is, that there should be such conduct on the part of the party against whom the estoppel is alleged as would make it a fraud for him to gainsay it.

Now apply the above rules to the conduct of the complainant in its dealings and actions with the defendants with reference to the territory lying north of the south line of section 10. Is there any doubt, from the uncontradicted evidence, that in all the dealings, acts, negotiations, conversations, arrangements and agreements, from first to last, between the parties, it was always understood that the section line was the northern limit of complainant's territory? Most certainly not. It does not meet the question to say that many of these acts of the agents or officers were not sufficient to convey title to real estate. The evidence shows that not a single act of any agent or officer of complainant relating to their dealings with defendants upon this subject, was ever repudiated by the complain-

ant: but on the contrary they all seem to have been acquiesced in, and ratified. It is not a queston of power or authority to convey lands, but it is a question as to whether complainant should not be equitably estopped from gainsaying what it has done, and what it has permitted defendants to do with reference to this property, in the belief that complainant laid no claim to anything north of said section line.

A brief review of some of the authorities on the subject of equitable estoppel may aid us.

In Dickenson vs. Colgrove, 100 U. S., 578, A, the owner in fee of lands in Michigan died in February, 1853, leaving his two children B and C, his only heirs at law. On March 3d, C and her husband conveyed the lands by warranty deed to D, who put it upon record March 6, 1854, and entered into possession of them April 1st of that year. D, learning of the existence of B, and that he lived in California, wrote to him, inquiring whether he made any claim to the premises. On April 1st, 1856, the latter addressed from California to his sister C, in Michigan, a letter, wherein he said: "You can tell D, for me he need not fear anything from me. * * * You can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it."

The contents of that letter becoming known to D, he, for a valuable consideration and by deeds with covenants of warranty, conveyed in fee the lands to E and others, who thereunder occupied and improved them. July 9th, 1865, B conveyed the undivided one-half of them by quitclaim deed to F, who March 6, 1873, brought ejectment. Held, that B's

letter of April 1, 1856, operated as an estoppel in pais, which precluded him from setting up a claim to them, and was an available defense to the action. Justice Swayne delivered the opinion of the court. He says:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden * * * This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. * * * In Faxton vs. Faxton, 28 Mich., 159, a mortgagee holding several mortgages prevailed on a son of the deceased mortgager, then intending to remove to a distance, to remain on the premises and support the family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years the mortgagee proceeded to foreclose. He was held estopped by his assurances upon which the son had acted. The court said: "The complainant may have estopped himself without any positive agreement, if he intentionally led the defendants to do, or abstain from doing anything involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages."

In Harkness vs. Toulmin, 25 Mich., 80, and Trues-

dale vs. Ward, 24 Mich. 117, this principle was applied in the former case, to the extent of destroying a chattel mortgage, and in the latter, of forfeiting rights under a land contract.

There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.

See also Kirk vs. Hamilton, 102 U. S., 68-79.
Maxwell vs. Bay City Bridge Co., 41 Mich., 453, at pp. 466-467.
Cleveland vs. Cosgrain, 92 Mich., 139-153.
McVicker vs. Filer, 31 Mich., 304 at 308.
State of Michigan vs. F. & P. M. R. R. Co., 89 Mich., 481 at 487.
2 Herman on Estoppel, Secs. 932, 933, 934, 935, 936, and 954.
Petue vs. Fater, 21 Wend., 172.
Watson's Executors vs. McLaren, 19 Wend., 563.

The principle involved is that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest inten-

tion to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case will not be permitted afterwards to assert his title and recover the property, at least without making compensation for improvements. It will be observed that in this case the complainant does not by its bill make any offer to reimburse defendants for improvements made on the property nor for money expended either in explorations or under the pumping contract. He that seeks equity should at least offer to do equity in his bill of complaint.

The complainant not only sets up the pumping contract in its bill of complaint, as a binding and valid agreement, but it offered it in evidence as a part of its case, evidently relying upon its fairness, legality and binding force on all of the parties interested in the subject.

As in Maxwell vs. Bay City Bridge Co., 41 Mich., 466, so here, money has been expended by defendants in reliance upon complainant's assent that it had no claim to property north of the section line.

See Manistee Mfg. Co. vs. Cogwell, 103 Mich., 602.

Let us examine the pumping contract in the light of this case. If there was an agreement, express or implied, fixing the line, in which there has been acquiescence, that is sufficient. An acquiescence under circumstances which imply an assent, and which has been followed by a change in the condition of the parties, made on the strength of such acquiescence, is sufficient. The above named case was reversed because the Circuit Judge erroneously directed a verdict for the defendant, instead of submitting the question of acquiescence to the jury.

If it is conceded, as urged by complainant's counsel, that the primary object of the parties in making the pumping contract was not to settle or dispose of any disputed question of riparian rights nor boundaries, still the question remains, was it not the intention of the parties to that instrument to so apportion the cost and expense of that work as to make the south line of section 10 the boundary line? Was not this fact, that the south line of section 10 was the boundary, made the basis of the contract in the apportionment of the expense and cost of that work? If so, was not this such an implied agreement and recognition of the line as fixed and established it within the meaning of the language of the Supreme Court in Manistee Mfg. Co. vs. Cogwell?

Is not this a fair test to apply: would the defendants have entered into and made the contract (pumping) on the terms therein contained, had the complainant claimed to them that it owned the territory now claimed, lying north of the south line of section 10, and that it proposed to extend its line to the so-called equitable center of the lake? Most certainly not. There is ample reason to say that defendants would never have made this agreement had the complainant informed them that it claimed to own a large part of the most valuable portion of the land in the bed of the lake north of the south line of section 10.

Judge Campbell says in Cronin vs. Love, 38 Mich., 385, that: "Estoppels when allowed must be based on something else than the silent permission of improvements by a party who has not acted in bad faith, or done any act which the other party had a right to regard as meant to govern his conduct."

Apply that rule to the pumping contract, so-called.

Was not the recognition of the south line of section 10 as the true boundary, something more than silent permission of improvements? Was not this very line made the basis of the agreement? It seems to me so, and it appears clear to me that it was an act on the part of the complainant which the other party has a right to regard "as meant to govern his (its) conduct."

In Bird vs. Stark, 66 Mich., at page 656, Judge Campbell, speaking for the court, says, "It is undoubtedly true, under our decisions, that, to make an arrangement less than fifteen years old binding, it must have been made with the understanding that it should be so regarded." Apply that test to the pumping contract. Can any fair-minded man read it without being satisfied that it was made with the understanding that the S. line of section 10 was to be regarded as the true line of ownership? It seems to me he cannot.

It is urged by complainant's counsel that at the date of the pumping contract, all of the parties considered the questions of boundaries and riparian rights put at rest by the case of Clute vs. Fisher and that the doctrine of mutual mistake applies.

I do not remember a word of evidence tending to show that either of the defendants had ever heard of the case of Clute vs. Fisher at the date of the contract, nor that there was action had by the parties in making the contract, in mutual ignorance of the facts.

It is essential to the granting of relief in equity on the ground of mistake that it should appear that there was error on *both* sides, and the mistake alleged must be proved distinctly, when not admitted.

Ludington vs. Ford, 33 Mich., 123.

This doctrine has been repeatedly stated by the Supreme Court, both before and since the decision of

the above named case. The complainant, therefore, is in no position to invoke the aid of the court upon this ground.

Further than that it has made no such claim in its bill of complaint. The complainant actively assented the development work of both defendants during nearly the whole year of 1896, and long after Mr. Kidder on his own claim had learned of his so-called mistake.

A single month of such delay, in the face of expensive development being carried on by the defendants, would defeat the effort to profit by it in a court of equity.

As I have before said no attempt is made in this case to impeach the pumping contract. This can only be done by a suit in equity to reform it. Over four years' acquiescence under the operation of this contract, witnessing the large expenditure of money, a complete change of the surface conditions, great changes in value by development undertaken at great hazards, seem to make the possibility of the claim of mistake in this contract improbable. Further, even in the presence of honest mistake, no court could reform such a contract without restoring the parties to their original status as to rights and benefits, and that could not be done in this case, either under the pleadings or proofs.

There is much force in the defendant's position that the complainant is estopped upon the ground that a license was given to both defendants to explore for ore for the purpose of discovering and removing ore, and upon such license a large expenditure has been made, by means of which the ore was discovered.

The license is not revokable after such expendi-

ture, and discovery of ore has been made, at least without an offer to reimburse defendants and place them in their original position. To do this would be very difficult, if not impossible, on a bill framed for that purpose.

A reference to some of the cases that discuss the doctrine of executed or irrevocable license may be profitable.

In Marble vs. Whitney, 28 N. Y., 297, it was held that when commissioners of highways had laid out a highway over premises of the plaintiff upon his personal consent, that he could not revoke such consent after the road was laid out and the alteration made. And it was said: "If the commissioners act immediately on the faith of the virtual consent, by laying out the road, or making the alteration, he (plaintiff) will be estopped from denying the legality of the act."

In Western Union Telegraph Company vs. Bullard, 31 Atl. R. 286, (Vt.) a party had given permission to a telegraph company to construct its line in front of his land on a highway, and the company had erected its line and incurred expense, acting on his consent; it was held that his consent was irrevocable at that stage of the work, certainly without any offer to place the company *in statu quo*. "The doctrine of equitable estoppel should be applied." Many authorities are cited. In the same case this language is quoted with approval:

> "Equity will decree specific performance when compensation in damages would be inadequate for the purpose of justice, and that partial execution of a parol agreement may supply the want of a writing, and withdraw the case from the operation of the statute of frauds.

> * * * When the revocation of a license would operate as a fraud, a chancellor will turn the licensor into a trustee *ex maleficio* for the licensee on principles analogous to those which apply when the owner of land stands by and allows another person to make improvements on it under the belief that he will be allowed to reap the fruits of his labor and expenditure."

In National Water Works Co. vs. Kansas City, 65 Fed. r. 691, the M. R'y Co. permitted a Water Works Co. to construct a pipe along the right of way to which the Railway Co. had title in fee. With the full knowledge of the Railway Co. the Water Works Co. expended considerable sums in the construction of such pipe line, and continued, without interference, to use the same for a number of years in supplying a large city with water. Held, that the Railway Company would be estopped to revoke the license thus acted upon. In that case Justice Brewer quotes the following language with approval:

> "From the cases which have been cited, we may deduce two things. * * * A license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, or placed with his assent, in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule that no one can recall a promise or declaration made with a view to influence the course of another after he has acted upon it, and placed himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises under these circumstances, to prevent the legal title from being used as a means of

injustice." Justice Brewer then proceeds as follows:

"There is nothing technical or arbitrary in the rule thus laid down, but it is founded on obvious principles of right and justice. It would be intolerable to permit the railway company after assenting to the construction of this flow line at such expense—a flow line by which supply works were connected with the distribution of a large city—and also assenting to the use of its right of way for such a purpose for a number of years, to withdraw the assent, and treat the connection so necessary for the successful operation of the water works system. Acts speaks louder than words, so conduct is equally potent with writing, and the conduct of the railway company has been such that a court of equity would unhesitatingly say that it is estopped from asserting that it had failed to grant in the proper manner the right to such use of the right of way."

In Norfolk & W. R. Co. vs. Perdue, (W. Va.) 23 S. E. R., 755, it was held that, when a party who claims to be owner of a tract of land has notice of the fact that a railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his rights, and assists in the construction of said tunnel from its commencement until its completion, and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages. That when one of two innocent persons, that is, persons each

guiltless of an intentional moral wrong must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible. The court says:

> "The bill alleges that the appellee was cognizant of the manner in which appellant claimed to have acquired title to said strip of land, and must be presumed to have known the land he claimed, and yet with all this knowledge he worked in silence for the company that constructed the tunnel, and set up no claim to any portion of said strip until after the tunnel was completed and the railroad constructed through the same. If he had objected when the work was commenced, the appellant might have made other arrangements, or perhaps changed the route. Would it then be doing equity to allow the appellee to wait in silence until the road was located, and the tunnel completed, and then assert his claim for damages? Surely not."

Herm. Estoppel, 776, on this point thus states the law:

> "If a person having a right, and seeing another person about to commit or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term acquiescence, and in that sense it may be defined as quiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. In the case of

Boardman vs. Ry. Co., 84 N. Y., 182, Miller, J., in the opinion of the court says:

"The principle applicable to such a case is laid down by Lord Denman in Pickard vs. Sears, 6 Adol & E., 174, as follows: 'The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time: and Miller, J., adds: 'Nor is it essential to an equitable estoppel that the parties should design to mislead, and it is sufficient if his acts are calculated to mislead, and have misled another acting upon it in good faith, and exercising reasonable care.' So also, the case of Jowers vs. Phelps, 33 Ark., the law in regard to estoppel in pais is well stated by English, C. J., as follows: 'Estoppels in pais depend upon acts which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud.'"

In Southern Marble Co. vs. Damiel, 21 S. E. R., 531 (Ga.), the plaintiff brought his petition against the Southern Marble Co. to recover damages alleged to have resulted to him from the diversion of water by defendant and for injunction to prevent any further

diversion. It was contended on the part of the defendant that the plaintiff was estopped from claiming damages, because, when the ditch was being dug, he knew the purpose for which it was intended, and not only stood by and saw the work going on, but was actually employed by defendant to assist in digging the ditch, and was paid for this service.

The court said: "If this be true, we think the plaintiff could not afterwards complain that the ditch diverted water from his premises. It would be inequitable and unjust to allow him to recover damages for an injury resulting from this cause. He could not stand by while the ditch was being constructed at a heavy expense, or aid in the digging of the ditch, receiving compensation therefor, and making no objection, and then recover damages for the diversion of the water from his premises, when he knew or ought to have known that this would be the result of the construction of the ditch. Under these facts, he would be estopped from obtaining an injunction against the use of the ditch and the continuous diversion of water thereby."

In McBurm vs. Thompson, 37 Pac. R. 57 (Oregon), riparian owners and their grantors had for eight years acquiesced in the diversion by a person who was not a riparian owner, of a part of a stream, and such person had yearly aided in keeping the channel of the stream open, and expended money on his farm, which would have been worthless without the water, and it was held that a court of equity would not enjoin a further diversion of the water at the suit of such riparian owners. The court says:

> "The defendant thus encouraged by the plaintiff's voluntary acquiescence and partici-

> pation in a common purpose, laid out their money and expended their labor in making homes for their families, under an obvious expectation that no obstacle would afterwards be interposed to prevent their enjoyment. The plaintiff's objection, in view of the unreasonable delay, and of all the circumstances of the case now comes too late; and under the maxim that 'he who is silent when he ought to speak shall not be heard to speak when he ought to keep silent,' he can have no standing in a court of equity to enjoin a diversion and use of the waters of a stream that he and his grantor have tacitly encouraged."

See also Flick vs. Bell, 42 Pac. R., 813 (Cal.) and cases there cited.

Clark vs. Glidden, 15 Atl. R., 358 (Vt.)
Morton Brewing Co. vs. Morton, 20 Atl. R., 286 (N. J.)
Nowlin vs. Whipple, 22 N. E. R., 669 (Ind.)
Saucer vs. Keller, 28 N. E. R., 1117 (Ind.)
Appeal of Clelland, 19 Atl. R., 352 (Pa.)

In this case the doctrine of executed or irrevocable license is fully discussed, and many Pennsylvania cases are cited.

It seems to me useless to cite further authorities. I shall conclude by citing the case of Twin-Lick Oil Co. vs. Mabury, 91 U. S., 592-3. That was a case in which the court estopped the complaining party from litigating a title to land valuable only for mining purposes, who had stood by and witnessed its development by defendant claiming title:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil

> wells. Property worth thousands to-day is worth nothing to-morrow: and that which would to-day sell for a thousand dollars at its fair value may, by the natural changes of a week, or the energy and courage of a desperate enterprise in the same time, be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the title to assert an ownership in such property to voluntarily await the event and then decide when the danger which is over has been at the risk of another to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value the class of property considered subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

The language of the court above quoted applies with striking force to mining property situated in this district. All of the parties to this suit realized the advisability of pumping the waters out of Lake Angeline to permit the taking of ore from beneath its bed. The complainant had felt so strongly the necessity that before the pumping contract was made Mr. Kidder, complainant's agent, considered the advisability of building a cofferdam across the southeast arm of the lake, so that the water could be pumped from that portion of the arm over the deposit discovered and opened by his company. At that time no deposit of ore was known to exist north of the line, anywhere near it. On March 16, 1892, the three companies joined in a petition to the common council of Ishpem-

ing asking permission to pump dry Lake Angeline for their mutual benefit, stating therein that the three companies owned all the land around the lake; that the south section line of 10 produced through the waters of the lake was the dividing line between the property of complainant and the defendant, the Cleveland Iron Mining Company, where that line was produced south of the east half of 10, and between complainant and the defendant, The Lake Superior Iron Company, where that line was produced south of the west half of section 10. Undoubtedly the assent of the city of Ishpeming was by all of the parties considered necessary, as preliminary to the contract. The petition conclusively presupposes an understanding between the three companies prior to the filing of the petition that their respective boundaries should be recognized and acted on as therein stated.

The petition was granted by the common council March 16, 1892. On March 17, 1892, the contract was drawn, which was duly executed by the proper officers of the respective companies in the most formal manner, and after the lapse of many months by the complainant.

I am aware that titles to land cannot in Michigan be maintained upon an estoppel, and where one by his conduct is precluded in law from asserting his title in property, there is strictly no transmission of title; yet this is a mere technicality: the legal consequences are precisely the same, and for all practical purposes the estoppel works a conveyance.

I shall therefore spend no time in discussing the question, of whether or not the pumping contract was so executed as to convey real estate under the mining laws of this state. It is very clear to me that it was

properly executed, so as to be perfectly legal and binding upon the parties for all the purposes intended. The same act and conduct that will estop an individual will estop a corporation. It was a sanction and ratification of all the steps that led up to its execution. Whether referable to that pumping contract or not in explicit terms, the subsequent acts, declarations, trespass, settlements, map making, mining of ore from the triangle, obtaining of railroad right of way, and other similar acts of the local officers of the complainant were done, and defendants were affected thereby, during the existence and under the apparent sanction of the pumping contract, executed in the manner stated and by the officers of the complainant duly authorized to carry out the terms of the said contract. Every act of every officer and agent of complainant in connection with the recognition of the south line of ten as its northern boundary, so far as the evidence in this case shows, has been ratified and sanctioned by the complainant. Therefore the sanction of that pumping contract extends to every act urged against the complainant company as an estoppel. All of the subsequent acts, declarations and statements are consistent with the contract, and are characterized by it.

Many other grounds are urged by defendants' counsel as reasons why the bill of complaint should be dismissed. I am content to place my decision on the ground herein stated.

The bill will be dismissed with costs to the defendants, to be taxed.

July 17th, 1897.

J. W. STONE,
Circuit Judge.

GEO. HAYDEN,
Solicitor for Defendant,
The Cleveland Iron Mining Co.

J. H. HOYT,
Of Counsel.

Copy of stipulation correcting omission from printed record.

Marquette, Mich., Feb. 12, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,

vs.

THE CLEVELAND IRON MINING COMPANY, and THE LAKE SUPERIOR IRON COMPANY.

Whereas it appears from the printed record in said cause in said court on page 219, that three letters written by the witness Bradt, to James E. Jopling, dated respectively December 12, 1895, March 6, 1896, and July 15, 1896, were offered by defendant's counsel and received in evidence as Exhibits 31, 32 and 33; and Whereas in the printing of the said record, as appears by the said page of the said record, Exhibits 32 and 33 were omitted in the printing:

It is hereby stipulated, by and between the solicitors for the complainant and the solicitors for the defendants, that said Exhibits 32 and 33 may be read upon the argument of said cause in said court, the same as though appearing in the said printed record, at the place they were offered by Mr. Hayden, solicitor for the defendant, The Cleveland Iron Mining Company.

Said Exhibits are as follows:

DEFENDANT'S EXHIBIT 32.

Ishpeming, Mich., March 6, 1896.

Jas. Jopling, City:

Dear Sir: I believe this sketch contains everything on surface and underground that you do not now have.

I beg pardon for having been so long in getting it to you.

Respectfully,

E. F. BRADT.

DEFENDANT'S EXHIBIT 33.

Ishpeming, Mich., July 15, 1896.

Mr. Jas. E. Jopling, City:

Dear Sir: I am going to locate the pipe line from where it enters the right of way at the farther end of the track, to where it leaves the parcel of land our company proposes leasing from your Co., and wish to put it on the tracing I have given you.

Will you please be so kind as to let the bearer have it, also the notes of the description of the land, and right of way.

It is possible, after taking up the matter again with Capt. Walters, we may wish to make an alteration, especially the right of way at the farther end of the track.

Respectfully,

E. F. BRADT.

J. O. CLARK,

Solr. for Compl't.

HOYT, DUSTIN & KELLEY,

Solrs. for Defendant The Cleveland Iron Mining Co.

Solrs. for Defendant The Lake Superior Iron Co.

No. 260.
Brf. of Dustin for Cleveland.
FILED
FEB 19 1900
JAMES H. McKENNEY
Clerk

SUPREME COURT

Filed Feb. 19, 1900.

UNITED STATES.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
vs.
THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY,
Defendants in Error.

October Term, 1899.

No. 260.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Brief for the Cleveland Iron Mining Company, Defendant in Error, on motion to dismiss the Writ of Error and on Hearing.

A. C. DUSTIN,
Of Counsel.

HOYT, DUSTIN & KELLEY,
Solicitors for the Cleveland Iron Mining Company.

THE PRESS-GAZETTE-WATSON CO., CLEVELAND, O.

Supreme Court of the United States.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY, Plaintiff in Error, vs. THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY, Defendants in Error.	Case No. 17,363. October Term, 1899. No. 260.

BRIEF FOR THE CLEVELAND IRON MINING COMPANY, DEFENDANT IN ERROR, ON MOTION TO DISMISS WRIT OF ERROR AND ON HEARING.

STATEMENT OF FACTS.

The complainant here, also complainant below, claiming to own some land which was formerly in the bed of Lake Angeline, a small fresh water lake containing about one hundred and fifty acres located in the municipal limits of the village of Ishpeming, Marquette county, Michigan, filed its bill in equity in the Circuit Court for Marquette county, Michigan, to have its boundaries determined and its lands set off to it in

severalty and for an accounting against the defendants for the ore which they had taken from the land alleged to belong to complainant, averring that the defendants were mining and threatened to continue to mine from complainant's property.

The controversy here arises over the boundary line separating the three properties of the three parties to this suit, who together own the whole of the land which was formerly the bed of the lake. The two defendants claim that the south line of section 10 separates their respective properties from the complainant's property.

On final hearing the Circuit Court dismissed complainant's bill from which complainant took an appeal to the Supreme Court of the State of Michigan, where the decree of the Circuit Court was affirmed. The case is here on a writ of error to the judgment of the State Supreme Court on the ground that there was a federal question involved herein which was decided adversely to complainant.

By examining blue print map, Record, page 36 (in all cases in this brief paging referred to is paging at the top of printed Record), it will be seen that Lake Angeline was an irregular lake with a central body and three projecting arms, extending into sections 10, 11 and 15. Complainant owned fractional lots 2, 3, 4 and 5 in section 15, derived by mesne conveyances from the original patentees of the United States government. Defendant, Lake Superior Iron Company, in the same manner had acquired fractional lots 4, 5 and 6 in section 10, and the Cleveland Iron Mining Company in the same manner had acquired "the east half of section 10 and the west half of section 11, in township 47 north, of range 27 west, containing five hun-

dred and forty-five acres and fifteen hundredths of an acre, according to the official plat of the United States government." This land acquired by the Cleveland Iron Mining Company had been entered against it on tax duplicate simply as the east half of section 10 and the west half of section 11, and before the commencement of this suit it had paid taxes on it as thus entered and described for more than fifteen years.

In the year 1886 (Record, pages 186, 190) the Cleveland Company found ore near the north line of the bed of the lake and subsequently opened up a mine there. In order to determine the extent of its deposit and whether there was any ore south of it, at great expense, it drilled through from this mine southward. The Angeline Company knew of this and requested permission to take up the drilling when the Cleveland Company reached the section line. This all occurred long before the pumping contract. The Cleveland Company encountered serious difficulty from caving ground and rock and stopped a little short of the section line, having discovered only some lean ore. The Angeline Company upon learning the result, decided not to continue boring. (Record, pages 117, 118 and 192.) As early, therefore, as this date complainant was recognizing the section line as the boundary.

By diamond drilling the complainant company, in the year 1890, discovered ore near the south border of the lake. Shortly after it put down a shaft to better conduct explorations and opened up a mine. (Record, page 98.) It became apparent late in 1891 or early in 1892 that this ore body extended under the water of the south arm of the lake and the Angeline Company wished to have the lake pumped

out. At one time, despairing of getting the other two companies to join with it, it contemplated putting a coffer dam on the section line, dividing sections 10 and 15, for the purpose of keeping back the water of the lake and then pumping out the water on its side of the dam, but the parties finally agreed to unite and pump out the whole lake. In addition to the boundaries, if they could be said then to be in dispute, two other questions were, necessarily, to be settled: The proportions in which the parties should bear the first cost of pumping out the water, and how, thereafter, the expense of keeping the lake bed dry should be borne. Both of these by the pumping contract were apportioned between the parties upon the understanding that the section line constituted the boundary between their properties. Not only does this fact appear from the oral evidence of the complainant's own witnesses (Record, page 103), but it appears from all the writings which related to the pumping of the lake. They consist in brief of defendant's exhibit "3," being the complainant's proposition to the Cleveland Company; the petition to the village council wherein the boundaries of the several properties are specifically set out; the pumping contract itself, wherein the recitals and the agreement clearly show this fact; the letter of the president of the complainant company in the August following, wherein he repudiated all concern in anything that took place north of the section line.

The pump which was necessary to get the water out of the lake was first to be paid for by all three of the parties, but when the permanent drainage commenced the Cleveland Company was to buy the complainant company's part of the pumping outfit, the

complainant company being able, by reason of the peculiar contour of its land, to take care of its part of the permanent drainage by the erection of a flume near the section line. Thereafter the Cleveland Company was to do all the pumping and apportion the cost thereof between itself and Lake Superior Company according to the number of tons of ore taken from the bed of the lake by each.

After the pumping contract was made all three parties prosecuted explorations vigorously. In a short time the complainant company learned that the vein in the south side of the lake was dipping toward the section line in such a way that it might go over the line and notified the Cleveland Company of its discovery. The Cleveland Company requested of the complainant company permission (which was readily granted) to go down into complainant's mine and prospect northward by diamond drilling. At a large expense the Cleveland Company drilled five diamond drill-holes northward, the complainant company, in a neighborly manner, furnishing the power. In return for this the Cleveland Company gave to complainant company maps showing the discovery as made by the diamond drill. The Cleveland Company also, about the same time, put down five holes from the surface just north of the section line and gave to complainant company maps showing the result of this investigation. On all these maps the section line was marked as the boundary.

The Cleveland Company, having in this manner discovered some ore just north of the south line of section 10, was confronted with the problem of how it should take it out. This deposit was separated from the Cleveland Company's mine on the north shore of

the lake by a fold of diorite rock some 600 feet wide. The officers of the Angeline Company discouraged the idea of running a drift across from this north mine, representing to the Cleveland Company that its deposit north of the section line was so small that the expense was not warranted, and the Angeline Company offered to take out that ore north of the section line on a royalty. The Cleveland Company desiring, however, to mine and market its own ore drifted through this 600 feet of solid rock into the ore body north of the section line, and sometime in the year '93 or '94 reached the section line on the first level, and from that time down to the bringing of this suit prosecuted its mining opera ions, extending its drifts and tunnels in every direction for the purpose of opening a mine—creating a mine structure—in order that it might economically thereafter take out the ore. About half of this mine structure was built in solid rock. This diamond drilling, drifting, mining operations, timbering, the building of a railroad some 3000 feet long, an electric plant for handling the ore—were all brought about only by the expenditure of a very large amount of money. This venture was one of the hazards of mining with which all of us have had too often, sad personal experiences, but which, in this case, turned out to be fortunate, and by the year 1896, after some two years of mining operations, it was clearly demonstrated that the Cleveland Company had a large and valuable deposit of good Bessemer ore just north of the section line dividing sections 10 and 15.

The complainant company did not know of the vast extent and size of this deposit until in the summer of 1896. During the exploration and mining the complainant and the Cleveland Company repeatedly

recognized the section line as the boundary between the properties. Thus, in 1894, complainant company trespassed a little over the line, promptly acknowledged the trespass and settled for it. Early in 1896 defendant, the Cleveland Company, trespassed over the line, which trespass was followed by an acknowledgment and settlement. Mining from the same deposit on opposite sides of an imaginary line it became necessary for each company to know what the other was doing and, therefore, there was a mutual exchange of maps from time to time of the mine workings upon all of which the section line was marked as the boundary between the properties. At two different times by joint survey and agreement, the officers of the two companies went into the mine and drove nails upon the boundary line and the miners of the two companies were cautioned to carefully observe this line in their mining operations. The complainant company took a lease from defendant, Cleveland Company, for stock pile grounds of a part of the very land it now claims to own. It also got permission from defendant to build a railroad over part of the very same land. As late as July, 1896, the Angeline Company was insisting upon this boundary line and got the defendant company to agree to leave some of its ore in place in order that the Angeline Company would not lose some of its ore which had, in the mining operations, fallen over the line and was in danger of being covered up. The lease for a railroad which crosses some of this disputed land, was also agreed upon in the summer of '96.

The complainant's bill is filed upon the theory that as a shore owner on the lake, it has riparian rights therein and owns a certain portion of the bed of the lake north of the section line. If this be true, then

the Cleveland company by the same rule, originally owned a certain part of the land south of the section line out of which complainant company has mined all the ore and filled the mine with refuse of various kinds.

The complainant company attempts to excuse all that it has done because of its belief at such time that the decision of the supreme court in Clute vs. Fisher, deprived it of any land north of the section line. The complainant company admitted on the trial that it learned in the winter of '95 of Ice Co. vs. Ice Co., 102 Mich., 228, and received from its attorney, on February 8, 1896, an opinion that the rule announced in Clute vs. Fisher, 65 Mich., 48, had been repudiated. Nevertheless it did nothing until November, 1896. Between February and November operations continued as theretofore: the section line as the boundary was repeatedly recognized; the Cleveland company continued its mining operations, and by the middle of the summer of 1896, had shown for a certainty the vast extent and value of its ore deposit north of the section line.

The complainant proposes to fix a point in the center of the lake as a so-called equitable center and from this point lay off the surface of the lake, the amount of surface area to each to be proportioned to the party's shore frontage. That is the only rule of division suggested by the complainant in its bill of complaint. Lines drawn to this point would deprive the Lake Superior Company and the Cleveland Iron Mining Company from all access to the water for considerable portions of their lake front. (Record, page 81 to 83.) It would also deprive the Cleveland company of its triangular piece below the section line. Whatever the rule may be it is certainly clear that a

shore owner is entitled to access to the water for every foot and inch of his ground.

A motion was made in this case to dismiss the writ of error coupled with a motion to affirm the judgment if this court has jurisdiction hereof. Notice was served on complainant and briefs in support of and in opposition to said motion filed by the parties. This court having ordered that said motion be heard with the case on the merits, we will follow the practice adopted by complainant in its brief filed herein on January 4, 1900, and print one brief covering the motion to dismiss and upon the merits.

II.

THIS COURT IS WITHOUT JURISDICTION AND THE MOTION TO DISMISS SHOULD BE GRANTED.

This court is without jurisdiction to review this case upon the merits, unless,

1. A federal question was raised and decided in the state court: and,

2. The decision of such federal question was necessary to the determination of this cause in the state court, and such decision was adverse to complainant: or, that the judgment as rendered could not have been given without deciding such question adversely to complainant.

Fowler, et al. vs. Lamson, 164 U. S., 252,
Laward vs. Denny, 158 U. S., 180-183,
Hammond vs. Johnston, 142 U. S., 78,
Church vs. Kelsey, 121 U. S., 282,
Clark vs. Penna., 128 U. S., 395,
Gray vs. Coon, 154 U. S., 589,

and other cases too numerous to make citation necessary.

It must affirmatively appear from the record that a decision was made on the federal question, and that such decision was against this complainant.

Detroit Street Ry. Co. vs. Guthard, 114 U. S., 133.

Endowment and Ben. Ass'n vs. Kansas, 120 U. S., 103.

Gray vs. Coon, 154 U. S., 589.

If there was any other question decided by the court which was sufficient to dispose of the case, this court is without jurisdiction.

Kennebec R. R. Co. vs. Portland R. R., 14 Wall., 23.

Clinger vs. state of Missouri, 13 Wall., 257.

Thus where a decision was based on an estoppel, it was held this court was without jurisdiction on appeal.

County of Adams vs. B. & M. R. R., 112 U. S., 123.

The only federal question which can be said to have been involved in this case was the construction of certain patents granting government land to the original patentees from whom, by mesne conveyances, the parties to this suit derived title.

So far as The Cleveland Iron Mining Company is concerned, complainant averred in the bill (see record pages 3, 4 and 5, Divisions III and IV), in substance that the United States government by patent dated July 2, 1850, conveyed to Lorenzo Burnell the fractional east half of section 10 and the fractional west half of section 11, containing 555.15 acres, said acreage consisting in part of fractional government lots fronting on Lake Angeline according to the government survey and that these fractional lots, by mesne conveyances, came to defendant, The Cleveland Iron Mining Com-

pany: that the Cleveland Iron Mining Company has acquired no title to the territory formerly covered by the inland lake except as acquired on account of its ownership of fractional lots 2, 3 and 7 in section 10 and lot 1 of fractional section 11, fronting upon Lake Angeline, and that the only ownership in the lake bed held by the Cleveland Iron Mining Company is by means of riparian ownership and not by metes and bounds and that the Cleveland Iron Mining Company owns "a right to the land to the center of said lake, to a common point of ownership, to be equitably determined between all of the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity."

In the latter part of Division VII of the bill (see Record pages 11 and 12) complainant made the following averment:

> "And your orator alleges that it owns said territory formerly under the water of said inland lake by virtue of its riparian ownership, as abutting owner upon the south side of said inland lake, under the laws of property ownership, established by the decisions of the courts of the State of Michigan and of the United States, as well as other states and countries; and that it has ever been the owner hereof, since it purchased said lots two (2), three (3), four (4) and five (5) of said section fifteen (15), as previously set forth. And your orator alleges that the defendant, The Lake Superior Iron Company, owns, on account of its frontage upon the said inland lake, from its frontage above described on the north-westernly shore of said lake to the said lines of ownership of your orator to the vertical point near the center of said lake, being the point of inter-

section above referred to, and that the defendant, The Cleveland Iron Mining Company, owns on account of its frontage above described on the north-easterly shore of said lake in a southerly direction to the said lines of ownership of your orator to the vertical point near the center of said lake, being the point of intersection above referred to. And your orator alleges that it and the said defendants are the owners of the entire territory, formerly covered by the water of the said inland lake, known as Lake Angeline, and that the exact boundary lines of ownership have never been established and fixed between your orator and the said defendants, and your orator desires that the same may be fixed and established by the decree of this honorable court, in accordance with the principles of law and equity."

In the prayer of the bill complainant asks the court to "decree a designation of the territory owned by your orator and the said defendants by lines that shall equitably locate the territory of your orator and the said defendants," etc.

Defendant, The Cleveland Iron Mining Company, answered this averment of the bill in parts IV and V of its answer (see Record pages 23 and 24), in which it alleged that the patent from the government in terms conveyed the east half of section 10 and the west half of section 11; averred that the government at that time owned all the land around Lake Angeline and intended to grant all the land included within the east half of section 10 and the west half of section 11; denied that there was any fractional lots conveyed to Burnell, the original patentee, and denied that the title the Cleveland company had was that of riparian ownership only, but averred that it received the same

by means of the language contained in the patents themselves.

On the trial of the case (Record, page 33), complainant put in evidence the original patent to Burnell, which described the land owned by the Cleveland Iron Mining Company as

> "The east half of section 10, and the west half of section 11, in township 47 north, of range 27 west, containing five hundred and fifty-five acres and fifteen hundredths of an acre, according to the official plat of the United States government."

Whether the issue so raised called upon the court for a construction of the original land patents issued by the government, and whether such construction raises a federal question we will hereafter consider; for the present, we have to say, first, if the state court made a construction of these patents, such construction was according to the contention of complainant and not adverse to complainant; and, second, that the decision was within the class mentioned by Justice Fuller in Hammond vs. Johnston, 142 U. S., 78, "upon an independent ground not involving a federal question."

This court will examine the opinion of the State Supreme Court to see what was then decided.

> Fire Asso. vs. New York, 119 U. S., 110, 116.
> Wood vs. Skinner, 139 U. S., 293, 295.

If the state court had placed its decision upon a construction of these patents adverse to complainant, the state court might and probably would have dismissed the bill for the reason that the Cleveland Iron Mining Company, by the very terms of its patents, acquired the land north of the south line of section 10. The consideration of questions of boundary settlement, estoppel, pumping contract, laches or anything

else would have been unnecessary. The state court must haved adopted the construction of the patents contended for by the complainant, to-wit, that the original ownership in the bed of Lake Angeline was not conveyed by metes and bounds to any of the parties to this suit, but on the contrary was originally owned by the parties as appurtenant to the grant of riparian rights. No one can read the opinion of either the Circuit Court or the Supreme Court of the state of Michigan and not be convinced that that was the conclusion reached by both courts. So we say, without fear of serious contradiction, that the construction placed by the state courts upon these government patents was favorable to complainant's contention and not adverse to it.

When we look at the briefs filed by the complainant in the state Supreme Court and the brief filed by the complainant here, it is apparent that complainant is attempting somewhat to change its position. In the brief prepared for complainant in the state court by the Hon. Alfred Russell, page 18, he says:

> "This bill is best described as a bill to determine questions of boundary between coterminus proprietors. There is no dispute about the title of either party but only about the boundaries."

In the other brief filed by the complainant in the state Supreme Court and prepared by Mr. Clark it was urged in support of the position then taken by complainant upon his so called 'mode of equitable apportionment', the following:

> "What then is the proper mode of equitable apportionment, or fixing the 'equitable' center and boundary of such ownership among abutting owners?

In the case of Lincoln v. Davis, 53 Mich. 389, 390, Justice Campbell used the following language: 'I agree that it depends on the *law of the state, how far rights may be exercised*, consistently with public easements of navigation, in the submerged lands. But I regard it as *settled by the common law of this state*, that such rights exist so far as they can be reasonably enforced and identified. * * * * ' Judge Campbell then states the *rule for the apportionment of an inland lake*, like the one under consideration in this case, in the following language: "In carrying out lines of ownership in narrow streams, it is easy to find the general course of a stream, and to draw lines perpendicular to that course from the terminal shore lines. But on lakes, all lines from the shore tend to converge in some *central* part of the lake, and while irregularity of shape prevents drawing them to a common center, they must, if protracted, *cross each other* in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area *in proportion to the shore frontage*, and never to attempt any division by lines run from the shore, from such parts of the lake as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would by his extent of shore line obtain a share beyond the center: but it seems *impossible*, if the whole water is to be regarded as divided up, to reach a division *without some proceeding in the nature of a partition*, which would fix the various possessions.'

Thus establishing the rule of apportionment by *convergent lines, to a common equitable center, from the extremity of adjacent ownership*, as we have described the division of the lake in the bill of complaint, and as appears on the map Exhibit A attached to the bill of complaint; and

as also appears on map Exhibit F of the evidence. This mode of division *apportions the lake into segments*, practically in proportion to the length of the adjacent frontage owned by each property owner. There can be no question that such division would be absolutely accurate, if the inland lake was exactly round; but, as suggested by Justice Campbell, the shore is usually irregular in form. Therefore, a division can only be arrived at in a manner most reasonable by *equitable apportionment* under the direction of the court.

Now, as to this case: Lake Angeline is about as broad as long, were it not for its *arms* lying east, west and south. If we were to cut off these arms, dividing the balance into segments, as above suggested, and apportion the arms separate by the 'river rule,' by a line drawn from the main body of the lake through the center of each arm, thus apportioning the arms separately, to the abutting owners and the main body by segments, adjacent to the holdings of the owners upon the main body of the lake, we would undoubtedly come to the *most equitable* mode of division possible. This is too near a mathematical demonstration for dispute.

This mode of division, under certain limitations, which we will afterwards consider, was referred to in Clute vs. Fisher, 65 Mich., page 52, in the following language: 'But in case of a body of water so large that the lines of the sections or subdivisions of sections, held by the proprietors of the lands adjoining or surrounding said lake, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the *center* line of said lake, in accordance with the rule laid down by Justice Campbell in Lincoln vs. Davis, 53 Mich., 390.'

Clute vs. Fisher has been overruled in many important respects by Ice & Coal Co. vs. Ice & Coal Co., 102 Mich., but *not as to this rule*, quoted from 53 Mich., 389: a rule of partition laid down by this court in the language of Justice Campbell. This rule has not been criticised by this court. But this rule as to partition, as laid down in 53 Mich. 389, was expressly affirmed in Ice & Coal Co. vs. Ice & Coal Co., 102 Mich., 236, 237, in the following language:

'The shore proprietor takes by virtue of shore ownership. His interest in the bed of the stream he acquires *as appurtenant to the grant*, and the extent of that interest depends upon his frontage and the form, length and breadth of the body of water upon which he abuts. That a lake may be of such form as to render the designation of the boundaries of the several riparian owners somewhat difficult, *is not an objection to the application of the rule.*' Mr. Justice Campbell says, in Lincoln vs. Davis, 53 Mich., 390: 'In carrying out lines of ownership in narrow streams, it is easy to find the general course of the stream, and to draw lines perpendicular to that course from the terminal shore lines; but on lakes all lines from the shore tend *to converge in some central part of the lake;* and while irregularity of shape prevents drawing them to a common center, they must all, if protracted, cross each other in a perplexing way. The rule adopted in such waters, where the whole surface could be appropriated, has always been to divide the water area in proportion to the shore frontage, and never to attempt any division by lines run from the shore, except over such parts of the lake as are substantially adjacent to the shore. In some cases, by a fair partition, a shore owner would by his extent of shore line, obtain a share beyond the center. But it seems

impossible, if the whole water is to be regarded as divided up, to reach a division without some proceeding in the nature of a partition, which will fix the various possessions."

And again in Jones vs. Lee, 77 Mich., 40, Justice Campbell used the following language: "It appears clearly enough in the present case, that while there is a considerable frontage facing northwest or southeast, the lake being longest in that direction, there must also be large end frontages, which look up or down the lake perpendicularly, or nearly so, to any line across from bank to bank, at most places along the shore. If this body of water were not navigable, and if all its waters could in any way be apportioned among the riparian proprietors for any lawful purpose, it is evident that it *could not be done* by reference to any *filum aquae*, or *middle thread*, but *must be done* by some rule of proportion which probably could *only* be got up by some *partition proceeding*, inasmuch as such waters are common for all ordinary purposes."

This quotation from 77 Mich. is cited with approval in Ice & Coal Co. vs. Ice & Coal Co., 102 Mich., 237.

And in the case of Hardin vs. Jordan, 140 U. S., 402, the United States Supreme Court used the following language: "If there should arise any dispute between the plaintiff and other riparian owners of land situate on the *margin of the lake, as to the convergence of the side lines*, of the plaintiff's land in the lake, it can be disposed of by the parties themselves, *by a resort to equity*, or to such other form of procedure, as may be proper."

Thus it has been held by this court, that there could be no proper division of an inland lake, similar to the one in question in this case by undertaking to divide it *filum aquae*, or at

> the *middle or thread of the stream*, according to the river rule. But that it should be by *convergent lines to a common equitable center, equitably determined* in a court of equity, as closely as it is possible to be done under the circumstances, but which can never be done to absolute accuracy. But whatever may be the rule adopted for partitioning such inland lake, there can be no question that the actual title to the submerged territory under the lake belongs to the abutting owners to the center of the lake or stream, to be apportioned in some equitable form between them, and that such title became *vested in the purchaser of the abutting lots, under the laws of the state*, which conferred upon such abutting owner the submerged territory, as appurtenant to his shore ownership."

(The italics above given are Mr. Clark's, copied from his original brief.)

In reply to this argument of complainant, defendant, The Cleveland Iron Mining Company, in one of its briefs filed in the state court, argued as follows:

"Complainant contends for the doctrine of riparian rights and argues that when the body of water is circular the center is a point to which all lines converge from the shore line. It admits that the three arms of Lake Angeline might be cut off and could be treated as streams, leaving only the central body to be differently divided. If a stream has a center line and a circular body a point to which the lines are to be drawn, it would seem to necessarily follow that every body of water which is neither a stream nor a circle must have a thread proportioned, in some way, between the length and breadth of the body; that is, that *point* must take on length and become a line when the body of water takes on length, until, as in the case of a stream, the

line extends the whole length. How long should this line be when the length of the lake is twice its width? It will not do to draw the line the entire length as in the case of a stream, as that would deprive the shore owner on either end of his fair proportion, for the lake having width the end owner has rights.

Jones vs. Lee, 77 Mich., 35.

Nevertheless, complainant's bill is filed on the theory that no surveyor can set off to it its land in severalty. We agree with complainant it cannot be done. Suppose we decide to cut off the three arms of the lake and divide them as streams. At what point will you cut them off? After that is determined how are you going to divide the balance, which i irregular in shape, not round? How much will you allow in this central body for shore frontages, and in computing shore frontages will you adopt the line where the arms were cut off or will you take the extent of the shore line of the whole lake, including the shore line of the arms cut off? By examining a map of the lake it is apparent that nearly every foot of each arm is opposite some portion of the central part of the lake, and is, on riparian principles, entitled to recognition. On the trial below complainant computed the surface of the entire lake and then divided the area proportionately to the shore frontage and proceeded generously to lay out, by lines drawn to a common center, such a part of the lake as would give to complainant the rich ore in the south deposit. This division of the lake, while giving an equal area in the water surface, perhaps, ignored the divisibility of the arms on riparian principles, and, furthermore, absolutely cut off at least two extensive portions of the lake from all access to the water.

These remarks are simply intended to show that even if complainant ever owned anything north of the section line, its boundary was a matter of great uncertainty."

It thus appears that the contention of the complainant in the state court and the complainant's whole theory of the case was that by virtue of its riparian right it was entitled to have its boundaries in the bed of Lake Angeline defined and the land thereof divided among the owners upon some basis of partition. Complainant attached a map to its bill which it suggested as one method of partitioning the lake, but admitted it was wrong at least so far as the three arms of the lake were concerned. The complainant therefore admitted that just what land it owned, if anything, in the bed of the lake, was a matter of great uncertainty. It could not, through a surveyor, lay it off by metes and bounds; it could only be determined by some equitable method of partition unless the parties could themselves agree upon it. As Mr. Clark stated in the above quotation from his brief, this partition "should be by convergent lines to a common, equitable center, equitably determined in a court of equity as closely as it is possible to be done under the circumstances, but which can never be done to absolute accuracy."

The Supreme Court of Michigan in our law record p. 257 said, "No fixed rule has been or ever can be laid down for the division of the territory covered by these inland lakes with their irregular shores, each case must depend upon its own peculiar circumstances and facts and as reasonable a division arrived at as possible."

It was apparent that complainant owned no land north of the south line of section 10 which could be

set off to it by metes and bounds by a surveyor. If so, complainant would have brought an ejectment suit. Complainant admitted that it needed the aid of a court of equity to determine its boundaries, in fact the whole purpose and object of its suit was to determine its boundaries in the former bed of the lake, and for that reason complainant cited the cases and made the argument above quoted in support of its position that its action was one in equity to settle uncertain boundaries and not at law to recover possession of any certain defined lands.

The Cleveland Iron Mining Company had always made claim to all the land north of the south line of section 10 by virtue of the language of its patents. From the evidence introduced by complainant it would appear that at one time this ownership was denied by complainant. Later, and as early as 1886, it seems to have been tacitly conceded. After Clute vs. Fisher was decided it was not thereafter questioned until the bringing of this suit. It was because of the above issues and the above arguments pro and con that Judge Grant, in giving the opinion for the Supreme Court of Michigan used the language complained of by complainant in this court, and which is claimed by the complainant to have been an adverse decision upon the construction of the patents. The actual language used by Judge Grant is to be found on printed record, page 262. It is as follows:

> "Complainant, however, invokes the doctrine that title to land cannot rest on estoppel on account of the statute of frauds, and that a vote of three-fifths of the entire stock of the company is essential under the statute to convey title. The obvious reply to the first proposition is that it is also established that the statute of

fraud does not apply to boundary lines, and that the doctrine of estoppel will be applied to the voluntary adjustment of disputed boundaries.

Hayes vs. Livingston, 34 Mich., 384–380.

Under the theory of complainant corporations could not settle boundary lines without a meeting of the stockholders called to pass upon the alienation of its lands, and the doctrine of estoppel could never be applied to a boundary line between corporations or between a corporation and an individual.

So, too, in reply to the second proposition it may be said that the statute does not apply to the voluntary adjustment of these lines, but to alienation by deed of conveyance. Complainant was not alienating, dividing or selling any of its real estate within the language of the statute.

How. St., sec. 4052.

Alienation means in law a transfer of title by conveyance.

Webster.

The Century Dictionary and Cyclopedia.

"The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders.

The contract was the act of the three parties to it. It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well the defendants, paid out large sums of money

under it. All are now estopped to deny its due execution and validity."

It is therefore apparent that the construction that complainant's counsel is here trying to place on the opinion of the Supreme Court of Michigan is a forced and unnatural one. The complainant was in the State Court contending for the very thing that the court stated, to-wit: That it owned no specific piece of land north of the section line which could be measured by metes and bounds, but it wanted the court to determine the extent of its lands and fix the boundaries. The court clearly assumed that the case as it originally stood was a case for the settlement of boundaries, but it held that the parties had themselves settled them by what had taken place.

In support of what we have here stated as to the evident views of the Supreme Court of Michigan on the ripairan rights of the parties originally in the bed of this lake, we wish to call the court's attention to certain parts of the opinion.

On page 256 the court say:

> "The difficulty in apportioning territory according to the theory of complainant is apparent from its irregular form. It seems conceded by the learned counsel for the complainant that the division according to the diagram, made a part of this bill, cannot be sustained, because they concede that it may be more equitable to divide the two arms of the lake according to the river rule, viz.: the medium *filum aquae*.
>
> It must also be conceded that the Cleveland Iron Mining Company under this rule would be entitled to some of the territory lying under the southeast arm of the lake south of the section line."

Again on page 257:

"No fixed rule has been or ever can be laid down for the division of the territory covered by these inland lakes with their irregular shores. Each case must depend upon its own peculiar circumstances and facts and as reasonable a division arrived at as possible."

Again on the same page:

"The above statement (referring to the statement of Mr. Bradt, the engineer who had located the so-called 'equitable' center under the direction of Mr. Clark, complainant's counsel.) is sufficient to show the difficulty in making an equitable apportionment, and while nothing was said during the negotiations leading up to the agreement, (the pumping contract), or in the agreement itself, in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood. It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt. Complainant had discovered a mine on its territory south of the line and extending under an arm of the lake. At that time it was the only one which it was known would be benefited by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine whether there existed under the bed of the lake ore worth mining. The contract, if valid, established the line beyond dispute. The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this

contract, recognized as valid and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of Clute vs. Fisher, 65 Mich., 48, as establishing the rule that the territory should be divided by the government lines."

Then again on page 259:

"We will first discuss and dispose of the question raised upon the theory that complainant relied upon the decision of Clute vs Fisher as an authoritative enunciation of the law in its negotiations and contract with the defendants, and that all the parties so understood it. The following, then, is the situation: We find that the parties in reliance upon that case entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each. Complainant made the contract with knowledge that it gained territory south of the line, known to be valuable, while it surrendered territory north of the line, not then known to possess any value. * * *

The anticipated result came. The explorations, expenditures and improvements were made, each company making them at its own risk. It is impossible to restore the *status quo* or to render exact justice between the parties because the data are not in existence. It is doubtful if a result approximately correct could be reached upon an accounting. It would be impossible to determine its correctness within many thousands of dollars."

Then again on page 261:

"This case is stripped of all other circumstances. It contains no element of misrepresentation, imposition, suppression, undue influence, undue confidence, imbecility or surprise. Neither said or did anything to mislead the

other. Each acted with deliberation and with complete knowledge of all the facts. The sole basis of complainant's claim is that the decision of this court, upon the faith of which the contract was made, was subsequently overruled. * *

We are, therefore, of the opinion that this case does not come within any exception to the rule that a mistake of law does not furnish any ground for relief.

Do the contract, settling the boundary line, and acquiescence therein and the acts done thereunder estop complainant now to assert a different line? The rule is settled by the decisions of this court that where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and parties have, for any considerable time, recognized them, they will be upheld though title by adverse possession could not be maintained.

Joyce vs. Williams, 26 Mich., 33.

Smith vs. Hamilton, 20 Mich., 433.

Jones vs. Pashby, 67 Mich., 459.

According to the testimony on the part of plaintiff, there was a dispute as to the boundary line. Mr. Kidder testified that the superintendent of the C. I. M. Co. asked him for a deed of the land lying north of the section line, but that he, for his company, declined to give it, making the same claim that he now asserts. If his testimony be true, and for this purpose the company must stand by its own testimony, there was a dispute and it was settled by the agreement."

Then again on page 262:

"The contract was the act of the three parties to it. It was induced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of

the corporation. Complainant as well as the defendants paid out large sums of money under it. All are now estopped to deny its due execution and validity.

* * * * * * * * *

"Complainant is entirely without equity. It doubted the correctness of the rule of Clute vs. Fisher, and thought that a different rule might sometime prevail. It was then its duty to take steps to test the question before permitting the defendants to enter into a contract and explorations involving over $100,000. It should at least have informed the defendants of its claim and given them the opportunity of making a contract with that in view. This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact that the venture proved successful after a large expenditure creates no equity for this complainant. The skill, energy and money of that company developed a valuable property. It ought in justice to reap the benefit and the complainant ought to be estopped to participate in the benefit unless an unbending rule of law prevents.

Twin Lake Oil Co. vs. Marbury, 91 U. S., 587.

Clegg vs. Edmondson, 6 DeG. M. & G., 787.

It would not have offered to bear its share of the loss if unsuccessful, nor could it have been compelled to.

Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Every one is presumed to know the law. Therefore, it must be presumed to have known of the laws enunciated in Ice & Coal Co. vs. Ice & Coal Co. It had an able attorney who keeps well versed in the decisions of the courts of this state. Yet it waited two years and a half before asserting its claim and still nine months after

obtaining the opinion of its attorney that Clute vs. Fisher was no longer the law it waited until circumstances and conditions have so changed that it is impossible to restore the *status quo.*"

In the light of the above quotations can anybody seriously contend that the Supreme Court of Michigan decided this case on a construction of the patents adverse to complainant? It is hardly conceivable that counsel, as able as the counsel that appears for complainant in this case, is serious in contending for the above proposition.

The issues raised in the answers of the defendants in their pleadings in this case were very succinctly stated by Judge Grant in his opinion. Record page 255. Omitting part of them, Judge Grant states the claim of The Cleveland Iron Mining Company thus:

> "3. Because the south section line of ten was fixed as a boundary by agreement between the parties, that agreement being recognized and evidenced by the pumping contract and its written adjuncts and was followed by continuous acts of recognition thereof and expenditures based thereon by both parties.
>
> 4. Because the pumping contract is an estoppel by deed against the complainant from now asserting title.
>
> 5. Because the complainant is estopped by matter *in pais* from asserting title to the land.
>
> 6. Because the complainant is estopped by its laches.
>
> 7. Because, as a tenant of a portion of the premises in dispute, complainant is estopped to deny defendant's title."

These are the issues, in addition to the claim made by the Cleveland Iron Mining Company, that it derived ownership of all land above the section line under the terms of its

patent, which were tried in the state court. As above stated, this one issue of construction of Cleveland company's patent was decided in favor of complainant.

Complainant now argues that the Supreme Court having erroneously found that the complainant owned no specific piece of land north of the section line proceeded erroneously, basing its decision on the first erroneous finding, to decide,

1. That complainant's rights north of the section line might be divested by a contract executed without the requisite three-fifths vote of stockholders, and, consequently, that the Supreme Court held the pumping contract sufficient for such purpose and would not have so held but for the previous erroneous finding of no specific land north of the section line.

2. Also, that the holding of the Supreme Court of Michigan was equally wrong in its views on the doctrine of estoppel, they being also based on the erroneous finding above mentioned.

It is a little difficult to grasp just what complainant intends to argue, but that seems to be its contention.

There are several answers to this.

1. The court was stating complainant's theory of riparian ownership in this lake and not deciding the question when it made use of the language complained of. The court did not deny complainant's original ownership north of the section line of land of uncertain boundary, but, on the contrary, as heretofore stated, assumed and conceded that proposition throughout the opinion. The whole case, as prosecuted by the complainant, was based upon the theory that it owned no specific land but rather had an interest in the bed of

the lake of uncertain extent and uncertain boundaries which it desired the court to define and set off to it. If the theory was wrong that is complainant's fault. The court was stating complainant's theory as made in the pleadings and deciding the case as made by the proof and briefs and arguments made by the complainant.

2. The purpose of this suit, as distinctly stated, was to define boundaries, and the Supreme Court of Michigan held that the statute of Michigan requiring a three-fifths vote of stockholders did not apply to a settlement of disputed boundaries. This court will not interfere with the construction placed by the Supreme Court of Michigan on a statute of that state.

3. The pumping contract itself was valid to convey title. It was executed with all the formalities of a deed, duly attested, acknowledged and recorded. The acknowledgment taken of complainant's officers specifically stated that they "executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto." (record, page 94.) This instrument, as thus acknowledged, was offered by complainant on the trial of the case as the valid contract of complainant. Whatever objections might be interposed to its authenticity and validity, as the act of the complainant corporation, if the instrument had been tendered by the defendants, vanished when the complainant itself offered the contract in evidence. Every presumption in favor of its validity as against the complainant must now be indulged. If a stockholders' meeting and a three-fifths vote were requisite to make the contract valid for all purposes, it will be presumed that they were had. In other words, complainant having offered this instrument in evidence under the

issues made in this case cannot be heard to deny its legal sufficiency for all purposes covered thereby.

The state court declined to hold with complainant that the contract was simply a "pumping contract." They say (p. 258) "The contract if valid established the line beyond dispute," and further on p. 259: "We find that the parties * * * entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each," and again "The contract * * was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. * * * All are now estopped to deny its due execution and validity."

The justice or the injustice of the decision of the Supreme Court of Michigan is not here for review on motion to dismiss. This court is without jurisdiction unless a federal question was decided adversely to the complainant. The case was disposed of and defendants' right to relief denied for various reasons mentioned in the opinion.

1st. There was a boundary settlement by the parties themselves (quotation from opinion of Supreme Court, page 257), "that contract was a deliberate settlement of the boundary line between the lands of the three companies and was so understood."

2nd. The complainant was estopped from claiming anything north of the section line. (Quotation from opinion of Supreme Court, page 258).

> "The contract if valid established the line beyond dispute."
>
> (Page 259). "It is impossible to restore the *status quo* or to render exact justice between the parties because the data are not in existence."

(Page 261). "Do the contract, settling the boundary line and acquiescence therein and the acts done thereunder estop complainant to now assert a different line?"

(Page 262). "The contract was the act of the three parties to it. It was introduced by complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant as well as defendants paid out large sums of money under it. *All are now estopped to deny its due execution and validity.*"

3rd. Complainant is without equity. (See opinion of court, page 263).

(Quotation from opinion). "Complainant is entirely without equity. * * * * This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. * * * * It was guilty of laches in keeping silence when it ought to have spoken. It waited until circumstances and conditions had so changed that it is impossible to restore the *status quo.*"

2. CONSTRUCTION OF THE PATENTS. EVEN IF CONSTRUED ADVERSELY TO COMPLAINANT WOULD NOT CREATE A FEDERAL QUESTION.

The only question of construction to be raised and decided in relation to the land patents was the extent of territory comprised in each. The extent and nature of such ownership is a matter of policy for the states themselves to determine and one in which the general government is not concerned.

Hardin vs. Jordan, 140 U. S., 402.
Barney vs. Keokuk, 94 U. S., 324.
St. Louis vs. Ritz, 130 U. S., 226.

3. IF THE CONSTRUCTION OF THE PATENTS WAS A FEDERAL QUESTION AND DECIDED ADVERSELY TO THE COMPLAINANT, COMPLAINANT DID NOT RAISE THE MATTER PROPERLY IN THE STATE COURT, WHICH IT IS ATTEMPTING TO HAVE CONSIDERED HERE.

In order to raise a federal question such question must be specially set up and the right claimed thereunder in the state court.

Hoyt vs. Thompson, 66 U. S., 518.
Texas & Pac. Ry. Co. vs. South. Pac. Ry. Co., 137 U. S., 48.
Leeper vs. Texas, 139 U. S., 462.
Mo. Pac. Ry. vs. Fitzgerald, 160 U. S., 556, 575.
Seward vs. Denny, 158 U. S., 180, 183.

This case was brought and argued in the state court on the theory that the complainant had some interest in the land which was formerly the bed of Lake Angeline, of uncertain extent and boundaries, and that it needed the aid of a court of equity to define such boundaries. The Supreme Court of the state so regarded complainant's case as there made. The complainant did not there urge that it owned any specific piece of land north of the south line of section 10. True, in its bill it claimed a certain triangular piece, but the prayer of the bill was for general equitable relief, and on the argument complainant admitted that the division set out in the bill could not be made, that the arms of the lake at least were susceptible of division by the 'river rule' and the central lake body proper by a rule of proportion. If the bill made claim to any specific piece of land north of the section line complainant abandoned this

claim on the trial of the case and urged simply the right to a definition of uncertain boundaries in some equitable manner. The court was stating complainant's theory not deciding the question when it said, "Complainant owned no specific piece of land north of the section line, even under its own theory which could be measured by metes and bounds. How much if any it owned could only be determined by agreement or the decree of a court of equity."

Even if the court had actually decided the question, the court would have been warranted in so deciding it because that was the very contention that complainant was making, and it would not lie in complainant's mouth to now complain of a proposition decided by the state court in complainant's favor and according to its contention there made. Therefore, if the state court did decide that complainant owned no specific piece of ground north of the south line of section 10, such decision was in harmony with the claim there made by complainant, and if such decision was wrong the complainant could not now object as it was raised here for the first time.

ARGUMENT ON THE MERITS.

I

THE COMPLAINANT COMPANY IS ESTOPPED FROM CLAIMING ANY TERRITORY NORTH OF THE SOUTH LINE OF SECTION TEN.

1. THE FACT THAT THE COMPLAINANT RECOGNIZED THE SECTION LINE AND AGREED TO REGARD IT AS ITS NORTH BOUNDARY BECAUSE OF THE DECISION OF THE COURT IN CLUTE vs. FISHER, DOES NOT MAKE SUCH A MISTAKE AS WILL WARRANT A COURT IN GRANTING THE RELIEF PRAYED FOR IN THE BILL OF COMPLAINT.

Granting that all the complainant did, it did because of its knowledge of Clute vs. Fisher, that will not prevent an estoppel against it.

> "A court of equity will not relieve a party from a contract entered into by mistake, where the mistake is one purely of law and unattended with misrepresentations, undue influence, misplaced confidence or other special circumstances of similar character.
>
> Thus a contract entered into by parties under a mutual supposition that the law affecting the subject of the contract was in accordance with a previous decision of the Supreme Court upon a similar state of facts, will not be set aside because of a subsequent decision by the same court, overruling the former one and declaring a different rule upon the subject."
>
> Syllabus, Kenyon vs. Welty, 20 Cal., 637.

"A subsequent decision of the court of errors in a different case, giving a different exposition of a point of law from the one declared by the Supreme Court, when the parties to a suit entered into an agreement relative to such suit, can have no retrospective effect so as to destroy the operation of such agreement.

The court does not relieve parties from their acts and deeds fairly done on a full knowledge of the facts though under a mistake of the law. Every person is charged, at his peril, with a knowledge of the law."

Lyon vs. Richmond, 2 Johnson's Chancery, p. 51.

In this latter case on p. 60, Chancellor Kent said :

"Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to most mischievous consequences."

The parties, since the pumping contract, have materially changed their position with respect to their properties and on the faith of the boundaries agreed upon and recognized in the pumping contract have expended hundreds of thousands of dollars in development work. They have made improvements of a lasting character. Granting, if you please, that Clute vs. Fisher was responsible for all that the parties did, an attempt now to upset everything because Clute vs. Fisher has been overturned would be very mischievous in its consequences to all parties to this suit, as will elsewhere clearly appear.

2. WITHOUT RESTORATION COMPLAINANT CANNOT RECOVER ANY PROPERTY NORTH OF THE SECTION LINE, EVEN IF ORIGINALLY SUCH PROPERTY BELONGED TO IT AND IT GAVE UP SUCH PROPERTY UNDER A MISTAKE OF FACT. RESTORATION IS IMPOSSIBLE. THEREFORE, COMPLAINANT CANNOT RECOVER.

Ordinarily acts done and contracts entered into by parties through a mutual mistake of fact will be relieved against if, before the condition of the parties has materially changed, either, promptly on the discovery of the mistake, offers complete restoration. It is however elementary that equity will not interfere to relieve a party from the consequences of such mistake unless restoration is possible. If the parties' rights in the bed of Lake Angeline are to be determined by shore frontage, the complainant company has mined out a large quantity of ore south of the section line which belonged to defendant, Cleveland Iron Mining Company, and has destroyed the mine from which it was taken and has no adequate means even of determining what amount was taken from that land. No definite explanation was attempted or offered by complainant below as to the amount of ore thus taken. On the contrary complainant claimed that *it owned this ore and never offered to make any restoration.*

The pumping contract offers an insuperable obstacle to restoration. If the court should find that originally complainant owned some land north of the section line, what is to be done with this pumping contract? As has been heretofore shown and as very clearly appears in the record, the expense to be borne by the parties to the pumping contract and the manner

in which the lake was to be permanently drained were fixed and settled on the theory that the complainant owned nothing north of the section line. If, therefore, some land north of the section line were to be given to complainant, it would necessarily follow that not only some additional part of the expense heretofore incurred in pumping out and keeping the lake bed dry, but also some part of the expense of continuous pumping thereafter, should be borne by complainant company; that is, the alleged mutual mistake which fixed upon the section line as the boundary prevaded and is responsible for the apportionment of the expenses incurred under the pumping contract. If it were equitable to readjust the boundaries, it would be inequitable to let the pumping contract stand.

When a court proceeds to interfere with a written contract it must proceed upon certain well recognized lines. It may reform the contract or rescind it. It can, however, reform it only when by some mistake or inadvertence the agreement of the parties was incorrectly set out. There is, however, no claim here that the contract was not written just as the parties intended it should be. There is no legal warrant for the court to change this pumping contract and prescribe new terms on some new theory that to the court would seem equitable, for that would substitute the court's contract of the parties and obligate them to an instrument to which they never gave their assent. A court may rescind a contract if it were procured by fraud or duress or if made under a mutual mistake, provided the court can place the parties *in statu quo*. No fraud or duress or other undue influence is claimed in this case. It, therefore, follows that the contract must either stand as it is or be rescinded

in toto, by reason of an alleged mutual mistake. The contract, as has been heretofore shown, cannot be permitted to stand if the boundaries are to be readjusted, and the alternative is then a cancellation of the contract. Not only is the bill not filed to procure a cancellation of this contract, but the contract can not be cancelled without doing irreparable injury to each of the parties. If the boundaries were readjusted and the contract cancelled, it would have to be done on the theory that the parties had riparian rights in this lake bed. With the contract out of the way it would be the right of any riparian owner to insist that the lake should remain in its original condition. Not only could any one of the parties refuse to join in the expense of keeping the lake bed dry, but each could also positively prohibit any of the others from keeping it dry. An injunction would lie to prevent the pumping out of the water at the instance of any riparian owner.

The Cleveland Company in reliance upon this contract and the fact that it provided for permanently keeping the lake bed dry, has caved in its north mine and made a direct entry into it from the lake bed. The refilling of the lake would destroy this property. It is unlikely that any of the three parties in any of their mining operations conducted under the bed of the lake have had in mind the possibility of the lake again filling with water. Mining under a bed of water is, at the best, a dangerous and expensive proceeding and it is probable that the refilling of the lake would destroy all of the mines in the bed of the lake. In dealing with this question of restoration and the consequences following a cancellation of the pumping contract, this court cannot consider the possibility or the

probability of self-protection or self-interest forcing these parties again into some pumping arrangement. In order for the court to act at all the court must, by its decree, prevent the irreparable injury. An irreparable injury follows as a legal consequence of the fact that any one of the parties can cause that injury. This irreparable injury forbids action on the part of the court.

We, therefore, say unhesitatingly that the pumping contract prevents an insurmountable obstacle to granting the complainant relief. To summarize this branch of the case we say:

(a) The pumping contract cannot stand if the boundaries are interfered with, because the very inducement and consideration thereof would then fail.

(b) The pumping contract cannot be reformed or changed by the court, as there exists no basis for the one, and the other substitutes the court's contract for the contract made by the parties.

(c) The contract cannot be cancelled without irreparable injury.

(d) The bill is not filed to obtain a cancellation of the contract and no offer is made to have it changed or cancelled.

The pumping contract, therefore, prevents restoration, and without restoration the bill must be dismissed.

3. COMPLAINANT DOES NOT OFFER TO MAKE RESTORATION.

It is probably idle to discuss in a court of equity the possibilities of restoration, when the complainant instead of being eager and willing and anxious, does not even offer restoration, but, on the contrary, is

unwilling that it should be made. Nowhere in the bill filed was there any suggestion of restoration, and in the argument the only thing suggested is the claim, broadly made, that the profits made in taking out the ore equal the expenditures in the mine. There was no offer in the state court anywhere to rescind, change or modify the pumping contract. Here complainant suggests that the court reapportion the expense by the territory awarded complainant. While an offer of restoration would, perhaps, not help the situation because of its impossibility, still it would have been some evidence of good faith on the part of the complainant—some proof of complainant's disposition to do equity. The complainant insists on the pumping contract; insists on keeping the ore mined from the triangle south of the section line and every other advantage accruing to it by reason of the alleged mistake in the boundary and by reason of the hazardous explorations and mining operations carried on for the last five years.

The defendants not seeking any affirmative relief, the jurisdiction of the court granting relief is limited by the case made by the complainant, and the complainant nowhere offers to submit the question of a change in the pumping contract to the court. The court, therefore, is without power or jurisdiction to interfere with this pumping contract and, consequently without power or jurisdiction to do complete justice.

When a court of equity is called upon to correct a mutual mistake it must place the parties where they were before the mistake was made. Not only is the court powerless to do it in this case, but the complainant has not even offered to permit it to be done.

4. THE LACHES OF COMPLAINANT ESTOPS IT FROM DISPUTING THE BOUNDARY.

According to the case made by complainant, from February to November, 1896, it was fully advised of all its rights. During this interval it stood by while the defendant, by its mining operations, converted what was a mere hope or opinion into an absolute certainty. (Record pages 206 to 207). This same summer the defendant repeatedly recognized the boundary line dividing the two properties:—among other things, took a lease of a part of the very property which it now claims to own. (Record pages 207 to 211). If the defendant's mining operations had suddenly been cut off by a ledge of rock, such as is encountered frequently in all kinds of mines, disappointing the most sanguine expectations, defendant would never have heard of complainant's claim. The complainant would have been entirely content to retain the ore which it had mined in the triangle south of the section line. Having learned, however, of the reversal of Clute vs. Fisher, and having discovered some months later that defendant's operations had disclosed a valuable deposit of Bessemer ore, complainant concluded to try to recover this property. Is not complainant's claim stale? A recovery by it would be a gross wrong and a fraud upon the defendant company.

Twin Lake Oil Co. vs. Marbury, 91 U. S., 587.

Clegg vs. Edmondson, 8 DeG. M. & G., 787.

5. THE FACT THAT THE COMPLAINANT COMPANY AT THE TIME IT AGREED TO THE SECTION LINE AS THE BOUNDARY LINE ACTED HONESTLY AND NOT FRAUDULENTLY DOES NOT PREVENT AN ESTOPPEL.

For the authorities and argument upon this subject we respectfully refer the court to the opinion of Judge Stone (other printed brief, pages 92 to 96); also to other brief pages 78 to 81.

> Herman on estoppel, vol. 2, Secs. 730, 731, 733, 735, 736, 759, 762, 754 and 772 to 776 inclusive.
>
> Tiffany vs. Anderson, 55 Ia., 405.
>
> Stewart vs. Mix, Sheriff, 30 La. Ann., p. 1040.

The cases cited by Herman in the above sections, as well as the text, expressly recognize the doctrine that extensive improvements made in the belief of an existing boundary will prevent restoration. The mine structure created by the defendant comes within the designation of an "extensive improvement," nearly half of it being in rock and built for the purpose of future mining operations.

While complainant's conduct prior to the discovery of the decision in Ice Co. vs. Ice Co., can be reconciled with good faith, its conduct from February to November, 1896, should be characterized as fraudulent, provided it insists upon its right now to recover this property. The interval was consumed by the Cleveland Company in large expenditures and in addition to the laches involved (which is elsewhere treated) the conduct of complainant during that interval will not commend itself to the court.

II.

THERE WAS A BOUNDARY SETTLEMENT BETWEEN THE PARTIES.

That it is competent for parties to settle an uncertain and disputed boundary even by parol is clearly established. The complainant attempts to gainsay a boundary settlement claiming that there was never any dispute over the boundary—that there was never any uncertain boundary to settle. There is no proof that the Cleveland Iron Mining Company ever heard of Clute vs. Fisher, but, on the contrary, that it made claim to all land north of the section line by reason of the description contained in its patents. It is also clear that Mr. Kidder, the agent of the complainant, did not regard Clute vs. Fisher as necessarily final and conclusive (see record, pages 101 to 102), and neither of the defendants said or did anything by reason of Clute vs. Fisher. Is complainant's case different, it it having relied, if you please, on the opinion of the Supreme Court, than it would be if it had relied on the erroneous opinion of the law given it by some attorney? The decisions of a court are sometimes spoken of as rules of property, and the federal courts usually recognize the state decisions as decisive on local matters: that is, they will apply the same law that the state court would apply, and they, therefore, recognize the state decisions as controlling. The decisions of courts, however, only declare the law and there is no reason to think that the federal court would have followed Clute vs. Fisher (the federal court refused in Hardin vs. Jordan, 140 U. S., 371, to follow 120 Illinois, 509, because in their opinion that decision was opposed to prior decisions in Illinois), and the

lower court in Michigan in Ice Co. vs. Ice Co., rejected Clute vs. Fisher. It was likewise open to the Lake Angeline Company to disregard or contest it.

Complainant seems to argue that Clute vs. Fisher was a rule of property. If that be so it would follow that rights acquired before it was reversed could not now be divested.

If it is not a rule of property, and complainant is hardly serious in thus contending, it is only an opinion, a bar only in the suit where rendered, controlling in other cases, even in the same state, only by force of its reason and logic. If well founded it will be followed; if not, it will not be followed.

Granting, if you please, that the Cleveland Iron Mining Company's claim to own all of the land north of the south line of section 10 under its patent was unfounded, if the complainant acquiesced therein it would constitute a settlement; and the fact that complainant was prompted to acquiesce because of the erroneous legal opinion of its attorney, reinforced by erroneous dicta of several other attorneys, who happened at that time to constitute the Supreme Court, uncommunicated to the defendant, the Cleveland Iron Mining Company, would not make a mutual mistake. Every law suit, honestly undertaken, has one mistaken litigant acting under wrong advice. Just which one is the mistaken party is often not determined until it reaches the court of last resort. Nearly every private settlement reduces, in amount, some valid claim by an offset of some unfounded claim honestly or dishonestly urged. Claims with little or no foundation are sometimes as persistently urged, if not more so, than well-founded claims, depending a great deal upon the peculiar temperament and char-

acteristics of the complainant. The Cleveland Iron Mining Company believed that its patents gave it the land to the section line. The complainant, acting upon the advice of its own attorney, if you please, that Clute vs. Fisher gave defendant that land, acquiesced in defendant's claim and proceeding on that acquiescence no longer contested defendant's construction of its patents, but expressly in solemn documents ending in a pumping contract, to be followed by extensive explorations and mining operations, involving hundreds of thousands of dollars, expressly recognized the section line as the boundary line. The pumping contract was witnessed and acknowledged as a deed of real estate in order that it might bind the successors and assigns of the parties thereto.

Mr. Kidder says that at one time Mr. Morse requested him to exchange mutual quit claim deeds making the section line the dividing line, but he refused as he believed his company owned to some place out in the lake. (Record pages 108, 109). Mr. Walters also (Record pages 224 to 227), testified to Mr. Mills trying in 1891 to get him to sign some paper relating to the boundaries. While this evidence is not entirely satisfactory and clear, as far as it goes, it tends to show that, prior to the pumping contract, there was some controversy, or at least an uncertainty, about the boundary.

The same law that would give complainant company any land north of the section line, would give the Cleveland company some land south of the section line and, therefore, when the boundary line was finally agreed upon, complainant company was getting something as well as giving up something, so that an agreement accepting the certain line as a boundary was upon a

valuable consideration and ought in law to be as binding as quit claim deeds. Be that as it may, the Cleveland company was claiming under its patent, and the reasons or grounds for acceding to that claim were never communicated to it by complainant. There may have been some question in the minds of those in control of the Cleveland company as to the exact construction to be placed on its patents, growing out of the reference in the patents to the government survey. They might have been moved by this reference to desire to place the question beyond controversy by quit claim deeds. There is, however, one thing certain. Clute vs. Fisher was never made the basis of defendant, Cleveland Iron Mining Company's claim to its property north of the section line.

There is, then, no reason for claiming mutual mistake. At most there is an unfounded claim urged on one side and an acquiescence in such unfounded claim by the other party on the strength of wrong legal advice of this other party's solicitor, which was never communicated to the Cleveland company. For some reason, at some time, the parties agreed to regard the section line as the boundary and at that time the land south of the section line which would have belonged to the Cleveland Iron Mining Company, by reason of its riparian rights in the lake, was undoubtedly apparently worth more than all the land immediately north of the section line. The parties from thenceforth have, until the bringing of this suit, regarded the section line as settling their boundaries. It will be noticed from the record that the president of the Cleveland Iron Mining Company during all these transactions and at the time the pumping contract was made, had died before this suit and that the complain-

ant did not call its president or executive officer and disprove the inference which necessarily follows from the facts, that an agreement settling this boundary was made before the pumping contract. But we need not go even this far, because acquiescence alone "under circumstances which imply an assent which has been followed by a change in the conditions of the parties, made on the strength of such acquiescence, is sufficient."

Manistee Mfg. Co. vs. Cogswell, 103 Mich., 602.

There are other reasons for regarding this boundary as settled. We are not furnished with the opinion of Mr. Clarke on Clute vs. Fisher, but he undoubtedly in that opinion, referred to various other cases, Lincoln vs. Davis, 53 Mich., 375, etc., which he now claims fix an equitable (?) center some place out in the lake as the boundary and he claims that this equitable (?) center is so uncertain that he needs the aid of a court of equity to find it although he is willing to aid the court in finding one which will give to his company all the valuable ore. He undoubtedly advised Kidder that his boundary was certain if he chose to rest on Clute vs. Fisher, but very uncertain if it was to be determined by the rule of Lincoln vs. Davis.

The complainant contends for the doctrine of riparian rights, and argues that when the body of water is circular the center is a point to which all lines converge from the shore line. It admits that the three arms of Lake Angeline might be cut off and could be treated as streams, leaving only the central body to be differently divided. If a stream has a center line and a circular body a point to which the lines are to be drawn, it would seem to necessarily follow that every

body of water which is neither a stream nor a circle must have a thread proportioned, in some way, between the length and breadth of the body: that is, that *point* must take on length and become a line when the body of water takes on length, until as in the case of a stream, the line extends the whole length. How long should this line be when the length of the lake is twice its width? It will not do to draw the line the entire length as in the case of a stream, as that would deprive the shore owner on either end of his fair proportion, for the lake having width the end owner has rights.

Jones vs. Lee, 77 Mich., 35.

Nevertheless, complainant's bill is filed on the theory that no surveyor can set off to it its land in severalty. We agree with complainant it cannot be done. Suppose we decide to cut off the three arms of the lake and divide them as streams. At what point will you cut them off? After that is determined how are you going to divide the balance, which is irregular in shape, not round? How much will you allow in this central body for shore frontages, and in computing shore frontages will you adopt the line where the arms were cut off or will you take the extent of the shore line of the whole lake, including the shore line of the arms cut off? By examining a map of the lake it is apparent that nearly every foot of each arm is opposite some portion of the central part of the lake, and is, on riparian principles, entitled to recognition. On the trial below complainant computed the surface of the entire lake and then divided the area proportionately to the shore frontage and proceeded generously to lay out, by lines drawn to a common center, such a part of the lake as would give to complainant the rich ore in the

south deposit. This division of the lake, while giving an equal area in the water surface, perhaps, ignored the divisibility of the arms on riparian principles, and, furthermore, absolutely cut off at least two extensive portions of the lake from all access to the water.

These remarks are simply intended to show that even if complainant ever owned anything north of the section line, its boundary was a matter of great uncertainty. That it is difficult of division, as is said in Ice Co. vs. Ice Co., furnishes no reason, in a proper case, for not doing it. How much weight did this uncertain bonndary have with complainant when it accepted Clute vs. Fisher? Kidder, complainant's agent, clearly shows that he knew that Clute vs. Fisher might be reversed. In any event, whether it was riparian rights, Clute vs. Fisher, or what, when once it was decided to drain the bed of the lake and mine ore therefrom, the necessity forever of settling the question of boundaries was paramount to all other considerations. Clute vs. Fisher furnished a certain rule. Riparian rights furnished a very uncertain rule. The Cleveland Iron Mining Company was claiming a construction of its patents which gave it the same property that it would get under Clute vs. Fisher. All of these considerations unquestionably entered into the mind of the complainant company and, as has been several times before stated, from the explorations made by the complainant company in its own territory, it looked as though there might be ore in this triangle south of the section line, but they had no suspicion that the ore body extended over the section line and the probabilities were that the piece of ground that complainant company would get from the Cleveland Company by adopting the section line as the

boundary was worth more than all the land on the other side of the section line. In Hardin vs. Jordan the court did not attempt, nor in Ice Co. vs. Ice Co. does the court attempt, to lay down any rule to aid or guide adjoining riparian owners. In both cases the court pertinently suggests that such questions "can be disposed of by the parties themselves," and in our opinion the evidence is overwhelming that that is what was done in this case.

HOYT, DUSTIN & KELLEY,

Of Counsel for Cleveland Iron Mining Co.

No. 260.

By Ball v. Nemaha for Def'ts

Office Supreme Court
FILED
MAR 31 1900
JAMES H. MCKENNEY
Clerk

SUPREME COURT OF THE UNITED STATES.

Filed Mar. 31, 1900.

October Term, 1899.

PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
Plaintiff in Error,
v.
THE CLEVELAND IRON MINING COMPANY AND THE LAKE SUPERIOR IRON COMPANY,
Defendant in Error.

No. 260.

In Error to the Supreme Court of the State of Michigan.

BRIEF IN BEHALF OF THE DEFENDANT,

THE LAKE SUPERIOR IRON COMPANY,

ON MOTION TO DISMISS AND ON HEARING.

MARQUETTE:
MINING JOURNAL CO. (LIMITED), PRINTERS.
1900.

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SUPREME COURT OF THE UNITED STATES.

PITTSBURGH AND LAKE ANGELINE IRON COMPANY,
v.
THE LAKE SUPERIOR IRON COMPANY AND THE CLEVELAND IRON MINING COMPANY.

October Term, 1899.
No. 260.

BRIEF FOR DEFENDANT THE LAKE SUPERIOR IRON COMPANY.

ON MOTION TO DISMISS WRIT OF ERROR, AND ON HEARING.

There is no statement of the case in the brief of plaintiff in error, such as is required by the rule, nor such as is necessary to inform the court, at the outset, of the nature of the controversy.

The brief of the defendant, the Cleveland Iron Mining Company, is very full and complete, except that some of the acts of the parties bearing on the question of estoppel as affecting the Lake Superior Iron Company are not stated.

Adopting, in the main, the statement of facts as set forth in the brief of our co-defendant, we offer the following as a condensed summary of the facts of the case. Our references are to the pages of the Record as printed for this court.

STATEMENT OF FACTS.

The record shows that the three parties to this case are the owners of the lots and parcels of land which form the entire frontage on Lake Angeline, as stated in the plaintiff's brief.

The said parcels of land have been owned by the respective parties and have been in their possession for many years. The amount of frontage upon the lake owned by the several parties does not appear. The plaintiff undertakes to give the frontage of each owner, by taking the length of the meander lines as the length of the shore lines, and they compute the acreage of the lake by taking the whole area within the meander lines (Record pp. 37 to 41). It is clearly shown by the evidence, however, and not disputed, that the meander lines do not even approximately correspond with the shore line, and consequently they furnish no criterion upon which to arrive at the entire length of the shore line, nor the length of the shore line of the respective parties. See testimony of George P. Cummings (Record pp. 155 to 159), and defendant's exhibit 2a, a greatly reduced copy of which appears at page 164; also testimony of James E. Jopling (Record pp. 194 to 196), and map made by Jopling, a reduced copy of which appears at page 218 of the Record (Def'ts Ex. 28).

The plaintiff claims the ownership of a portion of the bed of Lake Angeline, which has been drained, *by virtue of its riparian ownership*, marks out and defines a particular portion of said lake bed which it claims to own, and prays for a decree quieting its title to the portion of the lake bed so marked out and designated by it, and also prays the court to "*decree a designation of the territory owned by your orator and*

said defendants by lines that shall equitably locate the territory of your orator and the said defendants."

The defendants have been in possession of their respective parcels of land bordering on this lake for thirty years and upwards and no claim has ever been made by the plaintiff that it was the owner of any portion of the lake bed lying north of the south line of section ten (10), projected through the lake, until about the time of the commencement of this suit. See testimony of Mr. Hall (Record p. 147), D. H. Bacon (Record pp. 185, 187 to 189), and F. P. Mills (Record p. 194).

The plaintiff, in operating its mine, has wasted its rock into the waters of Lake Angeline and in doing so, for a time, wasted its rock into the lake north of the south line of section ten (10), opposite the property of the Lake Superior Iron Company, and put up some buildings, some of which were partly, and some wholly, north of that line, on the ground made by such waste; but this was not done under any claim of title but was tacitly permitted by the Lake Superior Iron Company, so far as the filling is concerned, because it was not considered by said company any damage to make such filling, and as for the buildings erected, no inquiry was made in regard to the line, and the Lake Superior Iron Company did not know whether they were over the line or not, but, not having any occasion to use the property, made no objection. See testimony of Mr. Hall (Record pp. 139 and 140).

No use of the bed of the lake, other than for wasting rock and the erection of the buildings mentioned, was made by either of the parties until about 1888 or 1889. The agent of the plaintiff, some time in the year 1887, learned of the decision, or dictum, of the Supreme court of Michigan in the case of *Clute v. Fisher*, to the effect that a riparian proprietor on an inland lake was

entitled to so much of the bed of the lake as would fill out the subdivision of land of which the fraction he owned formed a part. He consulted his counsel on the subject and was advised that such was the law established by that court, and that therefore the proprietorship of the plaintiff in the bed of the lake was restricted to that portion that lay within section fifteen (15).

No question had ever arisen between his company and the Lake Superior Iron Company on the subject, but without making any further investigation the plaintiff acquiesced in that view of the law, and of its own accord removed the most valuable of the buildings so that they would be entirely within the boundaries of the plaintiff's property as limited by the rule above mentioned. See testimony of Mr. Kidder (Record pp. 85 and 86).

From this time on all parties acted on the understanding that the south line of section ten (10), extended through the lake, was the boundary in the lake bed as well as on the upland, between the two defendants on the north and the plaintiff on the south.

No further occupancy or use of the lake bed lying between the Lake Superior Iron Company's property and the plaintiff was made until the time of pumping out the lake, as hereinafter mentioned. The Cleveland Iron Mining Company, however, commenced drilling holes in the bed of the lake in 1886 and discovered there a body of ore (Record p. 185-6), and in 1888 or 1889 sunk a shaft near the edge of the water upon the north side of the lake and drifted under the bed of the lake to reach that body of ore (Record p. 191).

The plaintiff in 1890 sunk a shaft on its property on the notheast quarter of section fifteen (15), by the edge of the north shore of the southeast arm of the

lake, which extends down into that section. They cross-cut from their shaft under the lake bed, where. in 1892, they opened up a body of ore, which was making northwesterly towards the section line, and drifted in both directions on this body of ore (Record p. 117).

The agent, superintendent and engineer of the plaintiff, being satisfied that the ore would probably extend northwardly across the line between sections ten (10) and fifteen (15), informed the agents of the Cleveland Iron Mining Company of that fact, and that undoubtedly the ore extended over on to the Cleveland Iron Mining Company's property (Record pp. 98, 99, 117).

At the request of the agents of the Cleveland Iron Mining Company the plaintiff allowed them to drive five diamond drill holes from one of the levels of its mine northwardly, in order to test the property lying north of the line, and they also bored five drill holes just north of the line, in order to further test the property (Record pp. 57-58, 98 99, 117.)

It having become evident that a large and valuable body of iron ore lay under the bed of the eastern portion of the lake, both north and south of the section line, and probable that ore might exist in the western part of the lake, belonging to the Lake Superior Iron Company, the parties, deeming it necessary for the successful prosecution of mining operations under the lake bed that the lake should be drained, began to negotiate with respect to joining in the expense of such drainage. The plaintiff was particularly anxious for the drainage of the lake and contemplated building a cofferdam along the section line dividing the southeast arm of the lake from the main body, so that it could take the water out of its portion of the lake and carry on mining operations there, unless it

could induce the other proprietors to join it in draining the entire lake (Record pp. 88-89, 104, 105, 106.)

The negotiations were carried on between the plaintiff and the Cleveland Iron Mining Company, and between the latter company and the Lake Superior Iron Company (Record pp. 88, 136).

In settling the question between the plaintiff on the one part and the two defendants on the other, as to the proportion of expense to be paid by each, the plaintiff insisted that its proportion should be smaller than the others, for the reason that the area of the lake belonging to it was smaller, and that it consisted only of the shallow portions of the lake (Record pp. 95, 103, 104, 105, 106, 107-108, 181, 193, 194).

It insisted that the central portion of the lake was much deeper than its part and that it had no interest in removing the water and mud from those deeper portions of the lake.

As to the expense of permanent drainage the plaintiff insisted that it ought not to pay any portion of that expense, for the reason above mentioned, except to construct a flume that would carry off the water coming into the lake bed from its property south of the section line (see Exhibit 3, p. 175).

After considerable negotiation the companies arrived at an agreement and, preparatory to carrying out that arrangement, they petitioned the common council of the city of Ishpeming, in which the lake was located, for permission to drain the lake, which petition embodied an ordinance they desired the council to pass (Record pp. 178 to 180).

This petition was signed by the agents of the three companies, in the name of the companies, and specifically defined that portion of the lake bed which each party claimed to own. It set forth that the Cleveland

Iron Mining Company owned all that portion of the lake bed situated north of the south line of section ten (10), and east of the center line of said section, extended through the lake; that the Lake Superior Iron Company owned all that portion of the bed of the lake north of said south line of section ten (10) and west of the center line; and the complainant in this cause owned all that portion of the lake bed lying south of the south line of section ten (10), projected through the lake, and also the surface right, as it was called, of the small fraction on the south side of the lake known as lot number six (6) of section (10).

It was entirely unnecessary in presenting this petition, to state the precise ownership of each of the parties, or that it be embodied in the ordinance; but the parties evidently deemed it wise and prudent to so define their respective ownerships, in order to show and place on record the claims as well as the concessions of each party as to ownership, upon which the pumping contract to be executed was based. This ordinance was passed March 16, 1892.

Upon the passage of this ordinance a contract was prepared for execution by the three companies, bearing date the 17th of March, 1892, a copy of which contract appears in the record at pages 88 to 94.

The contract recites the fact that the three parties severally own all the land abutting upon Lake Angeline, that iron ore has been discovered under the bed of the lake, and in order to economically mine the ore it is necessary that the lake be pumped out and permanently drained. It recites that a proposition has been made by the contractor to furnish apparatus for the permanent drainage and to pump out the water for a certain sum mentioned. And thereupon the said three parties respectively agree as follows:

The first party, the Cleveland Iron Mining Company, agrees to pay eight-fifteenths of the entire cost of purchasing the pump and apparatus and of pumping out the lake, amounting to $17,600.00, and eight-fifteenths of any additional cost necessarily incurred; and also an additional proportion of the pump and appliances after the water has been pumped out. The first party also agrees, after the lake is pumped out, to maintain and operate the pumping apparatus for the continuous and permanent drainage of the lake, advance all the expenses therefor, and that all the expense of such permanent drainage is to be paid by it and the Lake Superior Iron Company in the proportion of the number of tons of ore taken out each year from the lake bed by each of them respectively; and also two-thirds of the cost of any further apparatus which may be required.

The second party, the Lake Superior Iron Company, agrees to pay four-fifteenths of the cost of pump and apparatus and of pumping out the water, and the same proportion of any additional cost that may be necessarily incurred. It also agrees to pay its proportion of the permanent drainage, the same to be divided between it and the Cleveland Iron Mining Company in proportion to the number of tons of ore taken out each year from the bed of the lake, and also to pay for one-third of the cost of any additional apparatus needed for the permanent drainage of the lake.

It will be seen that these two companies bind themselves, not only to each other, but also to the Pittsburgh and Lake Angeline Iron Company, to continue the drainage of the lake, and to bear the entire expense of such continuous drainage.

The third party, the Pittsburgh and Lake Angeline Iron Company, agrees to pay three-fifteenths of the cost of pumping out the water, and three-fifteenths

of any additional cost necessarily incurred therefor, less the one-fifth of the value of the pump and appliances which is to be paid by the first party.

Instead of undertaking to bear any part of the cost of permanent drainage the third party agrees to erect and maintain a flume, so as to divert and carry away all the surface water that would otherwise come into the bed of the lake from the land lying above the water level and south of the south line of section ten (10), as projected through the lake, and also to run into that flume all the water it should pump from its mines, and to keep the same in operation "*until the iron ore to which said third party is entitled, lying on, in, or under the portion of the bed of said lake lying south of the south line of said section is mined and exhausted,*" and then to turn over the flume to the other parties and allow them to operate it at their own expense for the same purpose thereafter, it, said third party, being thereafter relieved of any portion of the expense of drainage of the lake or the maintaining of such flume,

It was further provided that the said agreement should extend to and be binding upon the successors, assigns and grantees of the respective parties.

The contract was executed by the president and secretary of each of said companies, *under their respective corporate seals.* It was executed and acknowledged by the Cleveland Iron Mining Company on the day of its date, March 17, 1892 (Record p. 93). It was executed and acknowledged by the Lake Superior Iron Company on the 6th day of July, 1892 (Record p. 94); by the president of the Pittsburgh and Lake Angeline Iron Company *on the 20th day of August, 1892* (Record p. 94) and by the secretary of said company on the *22nd day of August, 1892* (Record p. 94).

Under this contract the water was taken out of Lake

Angeline, when it was found that there was a large quantity of mud that had collected in the lower parts of the lake bed, which must also be removed, and an additional expenditure of something like $20,000.00 was required for that purpose (Record pp. 136, 137).

The complainant declined to pay the same proportion of that expense as was required for the pumping of the water, for the reason that it was not interested in those portions of the lake bed where the mud had settled, and its proportion was finally settled at much less than that originally fixed by the contract (Record p. 181, letter of Jas. Laughlin, Prest.)

Since the completion of the first drainage, the continuous permanent drainage has been carried on by the Cleveland Iron Mining Company, and the expense has been borne by it and the Lake Superior Iron Company, as agreed, and the cost of such drainage, to the time of the hearing of this cause, appears in the testimony of Mr. Hall (Record pp. 136, 137 and 138).

The cost of the original drainage also appears in the testimony of the witness Youngbluth (Record, p. 220).

These two companies are still pumping and keep up the permanent drainage and are paying the expense thereof.

Mining and exploring was carried on by the respective parties in those portions of the lake bed owned by them respectively, as stated in the aforesaid ordinance passed at their request, each company confining itself to the portions of the lake bed above mentioned, and neither making any claim to any other part of the lake bed until about the time of the commencement of this suit.

The Cleveland Iron Mining Company proceeded to explore by drill holes, as above mentioned, and then by a drill hole driven from its drift in the north part

of the lake bed southerly to or near the section line, and then by a drift extending from the north part of the lake bed to the section line, and by lateral drifts, and after opening a body of ore in that way carried on mining in the lake bed down to the south line of section ten (10) (Record pp. 42 to 44, 190 to 193).

At one time the complainant took out ore a little over the section line, acknowledged its trespass and settled therefor; and later the Cleveland Iron Mining Company also mined over to the south side of the line, acknowledged its trespass and settled the same (Record pp. 59 to 60, 61, 62, 181, 184).

Numerous communications were had back and forth between the two companies during the entire period from the making of the pumping contract to the last of October, 1896, in which the respective ownership of the companies to the section line as a boundary was recognized as a settled fact (Record pp. 64, 72, 98, 99, 114-115, 117, 135, 185, 186, 187, 194 to 197, 207 to 210).

After the draining of the lake the Lake Superior Iron Company carried on explorations in the lake bed, by sinking diamond drill holes, in order to ascertain whether there was ore that could be profitably mined, and carried on such explorations by means of drill holes from January 1895, to September 29, 1896 (Record p. 139).

A body of iron ore was discovered by such drill holes, a part of which comes within the area now claimed by the complainant, and a part outside.

In 1895 and 1896 they opened up that deposit and have been mining on it ever since.

The explorations, so far as sinking drill holes was concerned, were carried on openly, in plain sight of the office of the complainant. Twelve of these holes

were within the territory claimed by the complainant in this case, and the last two of them were within a few feet of the section line. See Mr. Hall's testimony (Record pp. 138 to 142); also location of drill holes as shown on map marked Exhibit 2a on page 164.

During all this time complainant made no protest, did not even suggest to the Lake Superior Iron Company's agents that it was expending its money on the complainant's property, but on the contrary pointed out to the agent of the Lake Superior Iron Company the locality of the section line, in order to enable him to locate the point for sinking the drill holes near the line (Record pp. 139, 140, 143, 144, 152, 153).

The agent of the Lake Superior Iron Company was aware of the fact that mining and exploring operations were being carried on in the east part of the lake at great expense, by the Cleveland Iron Mining Company, and of the fact of its right to do so and to explore and mine as far as the section line was recognized by the complainant (Record p. 145).

The agent of the Pittsburg and Lake Angeline Iron Company, about the last of December, 1895, heard something about the decision of Michigan Supreme Court in the case of *Grand Rapids Ice and Coal Company v. South Grand Rapids Ice and Coal Company*, 102 Mich. 227, which had been decided something over a year before, and which defined the law of riparian proprietors differently from what he had been advised was the decision in the case of *Clute v. Fisher*. He again called upon his counsel for an opinion, which was furnished him about the 8th of February, 1896, which he says he communicated to the principal officers of the company. Still the mining and exploring operations carried on by the Cleveland Iron Mining Company, and the explorations carried on by the Lake

Superior Iron Company, continued, to the knowledge of the complainant; negotiations were had in relation to the property, defining and settling a trespass accidentally committed by the Cleveland Iron Mining Company (Record pp. 62, 111, 112, 184), obtaining permission to use portions of the lake bed for railroad track and stock pile, etc., and no claim whatever was ever made and communicated to either of the defendants that complainant claimed any portion of the lake bed north of the section line until October 29, 1896 (Record pp. 143, 144, 99).

Acting upon the settled understanding expressed in the ordinance above mentioned that the south line of section ten (10) was the boundary between the properties of the defendants on the north and the complainant on the south, the complainant carried on its mining in the south arm of the lake without regard to any center line thereof, and took out and removed a large quantity of iron ore that would come within the territory of the Cleveland Iron Mining Company if the lake bed was divided by the center line (Record pp. 53 to 55). In fact all the operations of all three companies, and all their negotiations and dealings with each other since the making of the contract, as well as before, down to the 29th of October, 1896, were carried on with reference to the boundary lines as affixed and settled upon at the time of making the pumping contract.

Lake Angeline is about a mile in length east and west, and 1,690 feet in width north and south on the center line of section ten (10), extended through the lake, which is about its widest point. These measurements are from shore to shore at the surface of the water as it originally stood (Record p. 163).

The Cleveland Iron Mining Company owns the entire east end of the lake, the Lake Superior Iron Company

owns the entire west end, and the Pittsburgh and Lake Angeline Iron Company's frontage is entirely on the south shore of the lake, except that it owns the east end and a portion of the north shore of the southeast arm of the lake.

The Lake Superior Iron Company claims:

1. That there has been a practical division of the lake bed between the parties; that contracts, explorations and mining operations have been carried on on the strength of such division for many years, in which large sums of money have been expended, without any certainty at the time of such expenditures that returns would be realized by the defendants therefrom, and that, by such division and long course of construction between the parties, the complainant is estopped to claim any portion of the lake bed lying north of the section line.

2. That the pumping contract, executed by the several parties, under their corporate seals, and expressly providing that it shall be binding upon the successors and assigns of the several parties, making it a contract running with the land, amounts to a division of the lake bed by deed duly executed by the several parties.

3. That the pumping contract is so entirely based upon the division of the lake bed above mentioned, and said division forms so essential a part of the contract, that, if such division be set aside or disregarded, the contract itself must fall; that, in such case, not only is the agreement to continue the drainage of the lake at the end, but either party has a right to demand that the drainage of the lake must stop and the water be allowed to rise to its original level—a result which, after all that has been done under the pumping contract, and in reliance upon it, would work great injustice to the defendants.

4. That if the original division of the lake be disregarded and a new division must be made, such division must be made by the middle line or thread of the lake, in accordance with the common law rule for division of the bed of fresh water streams.

STATEMENT OF CASE AS BEARING UPON THE JURISDICTION OF THIS COURT.

The Bill:

The case was commenced by bill filed by plaintiff in in error in the circuit court for the county of Marquette, Michigan, and the following is a substantial statement of the allegations of the bill, omitting long descriptions and detail of conveyances:

1. That the plaintiff and the two defendants are the several owners of certain parcels of land, described, which together comprise all the lands fronting on a small inland lake known as Lake Angeline, in the said county of Marquette.

The bill further sets up in detail the patents from the United States and the mesne conveyances through which said parties derive their title.

2. The bill sets forth that the parcels of land surrounding said lake are fractional, states the number of acres in the several fractions, and that the lands conveyed by the several patents were confined to the acreage of land outside the borders of said lake. It states that the patent of the United States covering the land owned by the Lake Superior Iron Company conveyed lots numbered 4, 5 and 6 and the northwest quarter of fractional southwest quarter of section ten (10), in township forty-seven (47) north, of range twenty-seven

(27) west, which tract of land, so conveyed, contained 112.20 acres according to the official plat of the township. It is expressly alleged by the bill that the patent describes the land by reference to the public surveys "and that said lands are described in said government offices by the government survey, not only as lots, but as the fractional southwest quarter of section ten (10) of said township and range *and as being outside of the limits of said inland lake*, and as containing 112.20 acres according to the government survey, *and outside of the meander lines of said inland lake.*"

As to the land owned by the Cleveland Iron Mining Company, the bill alleges that it was patented as the east half of section ten (10) and the fractional west half of section eleven (11), in township forty-seven (47) north, of range twenty-seven (27) west, containing 555.15 acres, "said acreage consisting in part of fractional government lots fronting on said inland lake, according to the government survey thereof." (Record p. 3.)

After setting forth the said government subdivisions constituting the east half of section ten (10) and the west half of section eleven (11) the bill proceeds: And your orator further alleges that said 555.15 acres was the total amount of acreage conveyed to said Lorenzo D. Burnell [the patentee] by the United States government, and the said fractional portions of said lands above described constitute the territory bordering on said inland lake. * * * And your orator further alleges that the said Burnell and his grantees have acquired no title to the territory covered by said inland lake, except as acquired on account of their ownership of said lots 2, 3 and 7 of said fractional section ten (10), and lot 1 of said fractional section eleven (11), so fronting on said inland lake, and that said frontage ownership of said lake *by operation of law* and

not by *metes and bounds* vested in said Burnell and his grantees the riparian ownership of said inland lake outside said lots 2, 3 and 7 of said fractional section ten (10) and said lot 1 of said fractional section eleven (11) to the center of said lake, and a right to the land to the center of said lake to a common point of ownership, *to be equitably determined between all the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity.*" (Record p. 5.)

The bill proceeds to set forth the several patents by which the lands owned by the plaintiff were conveyed to the several patentees, in which the lands are described as lots, or fractions, containing a certain acreage therein mentioned.

After stating the various mesne conveyances by which the title had become vested in the plaintiff, the bill further sets forth that the plaintiff has been in possession of said fractional lots for many years.

3. The bill sets forth that the several fractions described "constitute the entire territory fronting on said inland lake known and described as Lake Angeline, above referred to, and that all the said fractional government descriptions of said land so fronting on said lake are owned by the plaintiff or the defendants as above stated according to the specific interests of each as herein set forth, and your orator alleges that the said abutting owners upon said inland lake are owners of the land and minerals under said lake according to the amount of frontage land upon the said lake owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake, as determined and equitably designated between the plaintiff and the defendants by the rules of equity" (Record pp. 8 and 9).

4. That within four or five years last past, the

plaintiff and the two defendants have by mutual consent shared in the expense of pumping out and draining said lake, each bearing a certain portion of the expense, so that the lake has been drained of water, except what is easily disposed of by moderate pumping.

5. That the territory covered by said lake belonging to the plaintiff "would be" the land embraced in certain triangles fully set forth and described in the bill, having for their basis the shore line of the plaintiff's lots of land abutting on the lake and having a common apex at a point in the lake which is styled in the bill as the "equitable center". The plaintiff attaches to the bill a map of the lake, or rather a map of the meander lines of the lake (which do not at all correspond with the shore lines) and lays down on this map the lines which, according to its idea of an equitable apportionment, would, or ought to be considered as belonging to it.

6. That said plaintiff owns "said territory formerly under the water of said inland lake, by virtue of its riparian ownership as abutting owner upon the south side of said inland lake, under the laws of riparian ownership established by the decisions of the courts of the state of Michigan and of the United States as well as other states and countries".

It further states that the Lake Superior Iron Company owns, "on account of its frontage upon the said inland lake", a certain portion of the original bed of the lake, and that the Cleveland Iron Mining Company "owns on account of its frontage above described", a certain other portion of the bed of the lake; and then follows the allegation: "And your orator alleges that it and the said defendants are the owners of the entire territory formerly covered by the water of the said inland lake known as Lake Angeline, and that the exact

boundary lines of ownership have never been established and fixed between your orator and the said defendants, and your orator desires that the same be fixed and established by the decree of this honorable court in accordance with the principles of law and equity" (Record pp. 11 and 12).

7. That the defendants assert ownership to all the lake bed lying north of the south line of section ten (10) extended through the lake and are proceeding with explorations and mining operations thereon, "utterly disregarding in their claim the long established principles of law as to riparian ownership of abutters on an inland lake", and without recognizing the right of the complainant to those portions of the lake bed claimed by it. (Record p. 12).

8. After praying for an injunction, the bill prays for the following relief:

"That this honorable court decree a designation of the territory owned by your orator and the said defendants by lines that shall equitably locate the territory of your orator and the said defendants;" and further prays that the plaintiff may be decreed to be the owner of those portions of the lake bed mapped out by it on the diagram annexed to its bill.

In this connection we call attention to the entire want of anything contained in the plaintiff's bill constituting a claim of "any title, right, privilege, or immunity under the constitution, or any treaty or statute, or commission held, or authority exercised under the United States". That it is not only true that the complainant did not claim that the patents of the United States conveyed any title or interest in the lake bed, but it expressly claimed and asserted by the bill that the land conveyed by the patents was limited to the area outside of the shore line, and that the rights

of the abutting owners in the lake bed were conferred, not by patent but by the rules of the common law, as the same were in force in the state of Michigan.

We also call attention to those portions of the biil which assert that the lines of the several holdings have never been established, and that a division by agreement or by decree of a court of equity in accordance with equitable principles is necessary.

The Answers.

The answers of both defendants set up at length the facts, a condensed statement of which is hereinbefore given, constituting an estoppel, and showing that the parties had made a division of the lake bed among themselves; and the Cleveland Iron Mining Company made the further claim that by its patent of the east half of section ten (10) and the west half of section eleven (11), the bed of the lake was conveyed as well as the up-land. The several patents and conveyances and, in fact, the title of the lands abutting on the lake, as alleged by the complainant, were admitted by the defendants.

The Case as Presented by Plaintiff's Counsel in the State Court.

Plaintiff's counsel in their brief in submitting the case to the supreme court of Michigan, urged at great length and with numerous citations of authority:

1. That in the case of irregular shaped lakes like

Lake Angeline it was impossible to lay down lines mathematically to separate and define the ownership of abutting properties in the bed of the lake and that for that purpose it is absolutely necessary that there be a division by agreement among the abutting owners themselves, or something in the nature of a partition by a court of equity.

2. That the patents of the United States did not purport to convey and did not convey any of the land or bed of the lake covered by the water, but conveyed only the upland and, as claimed by them, only such as lay outside of the meander lines.

Further, that the United States had no title, at the the time the patents were issued, to the bed of the lake, and that the officers of the Land Department, and the President of the United States, had no power to convey the bed of the lake; that the title to the bed of the lake vested in the state of Michigan at the time it was admitted as a sovereign state into the union, and that the ownership and disposition of the bed of the lake depends, and did at that time depend, entirely upon the law of the state.

Decision.

The decision of the circuit court, which is found on pages 235 to 246 of the Record, deals entirely with the question of estoppel. The court arrived at the conclusion that the parties had agreed upon a partition and that, by a long series of acts, and the expenditure of immense sums of money by the several parties in reliance upon the division so made, all parties were

estopped to assert rights contrary to the division so made, and dismissed the plaintiff's bill.

This decision and opinion of the Supreme Court of the state, in which the facts of the case are fully set forth, and the decision of the court given, is found on pages 248 to 264 of the Record.

The decision fully recognizes the title of the abutting owners to the bed of the lake, in accordance with the principles of common law as asserted by the plaintiff in its bill, and as expounded by the previous decisions of the court.

The claim of ownership made by the plaintiff to its proper proportion of the lake bed by virtue of its frontage, was also fully recognized.

Conceding the law as claimed by the plaintiff, the court decided:

(1) That the parties had by agreement under seal (referring to the pumping contract), deliberately apportioned and divided the lake bed between them (Record p. 259).

(2) That moneys had been expended, risks incurred, and acts done by which the plaintiff was estopped to question the validity or correctness of that division, and was estopped to claim any title contrary to the lines as thereby established (Record p. 261).

(3) That the plaintiff was entirely without equity (Record p. 263).

(4) The plaintiff was guilty of laches in keeping silence when it ought to have spoken (Record p. 263).

ARGUMENT.

I

The writ of error should be dismissed for want of jurisdiction.

It is the settled law of this court that to give the court jurisdiction of a writ of error to a state court, "It must appear affirmatively not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered, could not have been given without deciding it; that where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States another question not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Harrison v. Morton, 171 U. S. 38 at 47.
Pierce v. Somerset Railway, 171 U. S. 641.
White v. Leovy, 174 U. S. 91, 96.
Remington Paper Co. v. Watson, 173 U. S. 443.
McQuade v. Trenton, 172 U. S. 636, 639.
Chappell Chemical Co. v. Sulphur Mines Co. 172 U. S. 465, 471.
Capital Bank v. Cadiz Bank, 172 U. S. 425.

It affirmatively and distinctly appears from the record in this cause: First, that no Federal question necessary to the determination of the cause was presented to the state court for decision; Second, that the

judgment as rendered by the state court could have been rendered without deciding any Federal question; Third, that three questions not Federal were raised in the cause before thestate court and were decided by that court against the plaintiff in error, which decision upon each of those questions is sufficient to sustain the judgment rendered.

Those questions were questions of estoppel against the plaintiff in error, want of equity, and laches on the part of the plaintiff in error.

The subject of controversy in this suit is the title to the bed of Lake Angeline, the land on the shores of the lake being owned in severalty by the parties to the suit.

The Federal question which the plaintiff claims in this court to be presented is this viz: That the portion of the lake bed to which it asserts title was granted and conveyed to it by the patent of the United States.

The plaintiff's claim in this court is thus stated in the brief of its counsel (page 9). Referring to that part of the bed of the lake to which the plaintiff asserts title, the brief says: "This title to about thirty acres of mining territory adjacent to complainant's mine, under the lake and extending from its center to the south line of section 10 if projected east and west through the lake, is in dispute in this cause, complainant and defendant *each claiming it through patents from the United States government.*"

There was no claim made to the state court that the plaintiff in error claimed title to this disputed lake bed through patents from the United States government.

The only claim made in the state court by *the plaintiff in error* through patents from the United States government was this, viz: That under such patents it obtained ownership to the *lands bordering on the lake*, under the descriptions of lots 2, 3, 4, 5 and 6 of section 15.

Its further claim was, that having acquired such ownership of the lands bordering on the lake, it became, *by the laws of the state of Michigan*, the owner of the portion of the lake bed to which it asserts title.

Its ownership, through the patents of the United States government, of the lands claimed by it bordering on the lake, was not disputed in the case, and no decision was made against such ownership by the court.

The decision of the court was, that by reason of the contract made between the plaintiff in error and the defendants, of date March 17th, 1892 (being plaintiff's Exhibit I, Record pp. 88 to 94), and the acts of the parties done under and in pursuance of such contract, the plaintiff in error was estopped to assert its claim to that portion of the lake bed now claimed by it.

The court further decided that under the facts relating to the making of such contract, and the acts of the parties, and the outlay made by the defendants in pursuance of the contract, with the knowledge of the plaintiff, the plaintiff was "entirely without equity", and was guilty of laches "in keeping silence when it ought to have spoken".

Each of these questions decided by the state court was sufficient to dispose of the cause without reference to any federal question, and without reference to the source of the plaintiff's title to or rights in the lake bed.

The claim of the plaintiff in error, as presented to the state court, in reference to its title to that portion of the lake bed which is the subject of controversy.

First—The claim as stated in the bill of complaint.

The bill states the patent and conveyances by which the Lake Superior Iron Company acquired its title to its lands bordering upon the lake, in paragraphs *first* and *second*, pages 1, 2 and 3 of the Record, and follows the statement of the patent and conveyances with this statement, on page 3: "And said lands are described in said government offices by the government survey, not only as lots but as the fractional southwest quarter of section ten (10) of said township and range, *and as being outside of the limits of the said inland lake, and as containing one hundred and twelve and twenty one-hundredths (112.20) acres, according to government survey, and outside of the meander lines of said inland lake, and within the section lines and quarter-post lines of the said section ten (10), as fixed by government survey.*"

The bill then states the patent and conveyances by which the Cleveland Iron Mining Company acquired title to the lands bordering upon the lake, in paragraphs *three* and *four*, on pages 3, 4 and 5 of the Record. After specifying such patent and conveyances, the patent having been issued to Lorenzo D. Burnell, the bill states as follows, on page 5: "And your orator further alleges that the said Burnell and his grantees have acquired no title to the territory covered by said inland lake, except as acquired on account of their ownership of said lots two (2), three (3) and seven (7)

of said fractional section ten (10), and lot one (1) of said fractional section eleven (11) so fronting upon said inland lake, and that said frontage ownership on said lake *by operation of law, and not by metes and bounds, vested in said Burnell and his grantees the riparian ownership of said inland lake opposite said lots two (2), three (3) and seven (7) of said fractional section ten (10), and said lot one (1) of said fractional section eleven (11) to the center of said lake, and a right to the land to the center of said lake to a common point of ownership* **to be equitably determined between all of the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity; your orator alleging that each of said abutting owners are entitled to the territory under said lake to the center thereof, from their own abutting ownership."**

The bill then states the patents and conveyances by which the complainant (the plaintiff in error) acquired title to its lands bordering on the lake (paragraphs *five* and *six*, pages 5, 6, 7, 8 and 9 of the Record).

Referring to its lots 3, 4 and 5, the bill says, on page 6: "And your orator, *as the owner of said fractional lots* three (3), four (4) and five (5) of said section fifteen (15) *is the owner of the riparian rights on said inland lake, and of the land under said lake to its center.*"

Referring to its lot six, the bill says, page 8: "And your orator further alleges that by virtue of said last named deed your orator acquired all the right, title and interest of said defendant, to the said lot six (6), *and its abutting riparian ownership, to the center of said Lake Angeline*, except the minerals thereunder, and the right to remove said minerals therefrom."

Having stated the title of each of the parties to this

suit to their lands bordering on the lake in the above manner, and referring to all the lands bordering on the lake owned by the three parties, the bill says (pages 8 and 9 of the Record): "Your orator further alleges that said fractional southwest quarter of the southwest quarter of said section eleven (11), and said lots two (2), three (3), four (4), five (5), six (6) and seven (7) of said section ten (10), and lots two (2), three (3), four (4) and five (5) of said section fifteen (15), constitutes the entire territory fronting on said inland lake, known and described as 'Lake Angeline', above referred to; and that all the said fractional government descriptions of said land so fronting on said lake, are owned by the complainant, or the defendants above referred to, according to the specific interests of each, as herein set forth. And your orator alleges that the said abutting owners upon said inland lake are owners of the land and minerals under said lake, according to the amount of frontage land upon the said lake owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake, *as determined and equitably designated between the complainant and the defendants by the rules of equity.*"

After these statements of the titles of the respective parties, it then states the plaintiff's claim to the specific part of the lake bed claimed by it, as follows (p. 10 of the Record): "And your orator further alleges that the territory covered by the said lake belonging to and owned by your orator *by virtue of the ownership of said lots* two (2), three (3), four (4) and five (5) of said section fifteen (15) bordering upon the shore of said inland lake, would be that territory described as follows:" Then follows a description by metes and bounds.

Having stated in the above manner the specific par-

cels of land bordering on the lake owned by each of the parties, and the patents and conveyances through which their respective ownerships were acquired, the bill states the complainant's title to that part of the lake bed which it claims in the following manner (Record p. 11):

"*And your orator alleges that it owns said territory formerly under the water of said inland lake by virtue of its riparian ownership, as abutting owner upon the south side of said inland lake, under the laws of property ownership, established by the decisions of the courts of the State of Michigan and of the United States, as well as other states and countries.*"

The above statements of the bill of complaint constitute the entire of the claims made by the plaintiff in error of its title to the property in dispute.

The attention of the court is especially invited to these points presented by the bill of complaint, viz:

(*a*) That by the bill no claim is made that title to the lake bed was conveyed by the patent of the United States, or that the title to the lake bed was acquired through such patent.

(*b*) The ~~defendant's~~ plaintiff's asserted claim is that the plaintiff in error obtained its title *to the lands bordering on the lake* through the United States patent, and that its ownership and title to the lake bed is under and by virtue of its "riparian ownership as abutting owner upon the south side of said inland lake, *under the laws of property ownership, established by the decisions of the courts of the State of Michigan and of the United States, as well as other states and countries.*"

This is simply the complainant's way of saying that it derives its title to the lake bed through the common law of this country, which law attaches ownership of

inland lake beds to riparian ownership of the adjoining land.

Most clearly this claim of ownership thus made does not present a Federal question.

Second—The case presented by the bill relating to the boundaries of the part of the lake bed in controversy.

The bill shows that the boundaries of the portion of the lake bed to which the plaintiff asserts title ~~were~~ was not defined by any of the means through which it derived its alleged title. The several allegations of the bill to the point are as follows:

On page 5 of the Record, referring to the ownership of the Cleveland Iron Mining Company of its lake frontage, the bill says: "And that said frontage ownership on said lake *by operation of law, and not by metes and bounds*, vested in said Burnell and his grantees the riparian ownership of said inland lake opposite said lots two (2), three (3) and seven (7) of said fractional section ten (10), and said lot one (1) of said fractional section eleven (11) to the center of said lake, and a right to the land to the center of said lake, to a common point of ownership to be equitably determined between all of the abutting owners upon said inland lake, *either by mutual consent or by determination of a court of equity.*"

On page 9 of the Record, the bill states as follows: "And your orator alleges that the said abutting owners upon said inland lake are owners of the land and minerals under said lake, according to the amount of frontage land upon the said lake, owned by each, and subject to any mineral reservations contained in any deeds herein referred to, to the center of said lake,

as determined and equitably designated between the complainant and the defendants by the rules of equity."

On page 12 of the Record, the statement of the bill is as follows: "And your orator alleges that it and the said defendants are the owners of the entire territory, formerly covered by the water of the said inland lake, known as Lake Angeline, *and that the exact boundary lines of ownership have never been established and fixed between your orator and the said defendants, and your orator desires that the same may be fixed and established by the decree of this honorable court, in accordance with the principles of law and equity.*"

On page 13, the prayer of the bill says: "That this honorable court decree a designation of the territory owned by your orator and the said defendants, *by lines that shall equitably locate the territory of your orator and the said defendants.*"

In this manner the bill presents the case of unsettled and undefined boundaries of the property in dispute.

The designation by the bill, on pages 10 and 11 of the Record, of the boundaries claimed by the plaintiff is based upon a mere assumption.

The bill having stated that the plaintiff's title to the bed of the lake is acquired through the common law which apportions the lake bed to the riparian owners, the boundaries would necessarily be such as the application of the principles of that law would define them, and their location would depend upon a consideration of the entire contour of the shores of the lake, including its body and arms, and also the contour or shape of the shore of the several portions belonging to the different owners and their relations to each other as well as to the entire of the lake.

Third—The case presented to the state court by the plaintiff's evidence.

The evidence of the plaintiff related to the conveyances by which it acquired title to its lands, the designation upon maps of the portion of the lake bed to which the plaintiff laid claim, the negotiations which led up to the making of the contract of March 17th, 1892, between the parties to this suit, the acts of the parties under that contract, and the extent to which the plaintiff claims the defendants had trespassed by exploration and mining upon that portion of the lake bed to which it makes claim.

From this evidence it appeared that the boundaries of the part of the lake bed claimed by the plaintiff could only be determined by an agreement between the parties, or by a decree of a court of equity.

It also appeared that the parties had entered into an agreement of March 17th, 1892, to adjust the boundaries of their respective portions of the lake bed.

The evidence in respect to the boundaries of the property in dispute appears in the testimony of the plaintiff's witness, E. F. Bradt, on pages 36 to 40 and 46 to 50 of the record.

The testimony of this witness shows that at the request of the plaintiff's counsel he made maps of Lake Angeline from the field notes of the government survey, and from another map.

On the maps, by direction of the plaintiff's counsel, he drew lines to define the portion of the lake bed which the plaintiff claims. He made no measurements and ran no lines upon the ground or lake for the purpose of locating or mapping such portion of the lake bed.

The maps made by him are Plaintiff's "Exhibit A" (p. 14) and "Exhibit F" (p. 40 of the Record).

Upon cross-examination the witness says that in making the maps he had nothing to do with the lake itself, as it actually existed. He simply made his maps from the field notes. (R. pp. 47, 48, 49).

In drawing the lines upon the maps to designate the part of the lake bed claimed by the plaintiff, he simply drew those lines as the plaintiff's counsel directed him to draw them.

These lines were not run or measured on the ground and have not in any way been proved. (R. pp. 48, 49).

The center point in the lake bed, to which the lines converge to show the part of the lake bed claimed by the plaintiff was a point not found or fixed by the witness from any measurements made or from any data possessed by him. This point was located on the map by the plaintiff's counsel taking his pencil and designating the point as a point to be "considered the equitable center," and from that point so designated he then drew his lines.

The witness says if the original corners could be found, (and he does not know whether they could be found or not) it might turn out that the location on the map might be erroneous both as to corners and distances. (R. pp. 49, 50, 51).

The witness paid no attention as to what frontage would belong to other portions of the shore, and he shows that by adopting the "equitable center" which he made use of in preparing his maps, in an actual division of the lake bed, portions of the shore of the lake, and which portions were owned by the defendants, would be allowed no lake frontage at all. (R. pp. 81, 82, 83).

Evidence was given by the plaintiff's witness, Alfred

Kidder, who was the plaintiff's general agent, that the plaintiff was in doubt as to whether it had any rights at all in the part of the lake now in controversy, and being in doubt, obtained the advice of the plaintiff's counsel, Mr. Clark, which advice confirmed those doubts, and acting thereupon, the plaintiff removed its buildings from that part of the lake, in the year 1887. (R. pp. 84, 86, 87. 101, 102).

Coming to the contract of March 17, 1892, made between the parties to this suit, which is plaintiff's "Exhibit I" (Record pp. 88, 89, etc.), the bill of complaint contains this averment, on page 10 of the Record, in reference to the contract, viz: "And your orator further alleges that within the last four or five years, by mutual consent, your orator and the said defendants shared in the expense of pumping out and draining the said inland lake; your orator paying three-fifteenths of said expense, the defendant, The Lake Superior Iron Company, four-fifteenths, and the Cleveland Iron Mining Company the balance, so that now said lake has been drained of water, except what is easily disposed of by moderate pumping."

The plaintiff's evidence shows that *after* its doubts had arisen in reference to its ownership of the part of the lake bed in controversy, and acting upon those doubts, it had removed its buildings therefrom, it negotiated with the defendants for and made with them the said contract of March 17th, 1892.

The plaintiff gave evidence also of the acts done by the defendants under the contract, and the acts of the defendants after the contract was made in exploring and mining in this disputed ground.

E. F. Bradt, R. pp. 42 to 46, 53 to 84.
Alfred Kidder, R. pp. 95 to 115.
Thomas Walters, R. pp. 115 to 128.
James Read, R. pp. 128 to 131
William Tregambo, R. pp. 131 to 135.

The defendants gave evidence upon the same points, showing the acts done and the expenditures made by them upon the faith of the contract, and the acts of recognition on the part of the plaintiff of the ownership of the Cleveland Iron Mining Company of that part of the lake bed which the plaintiff now claims (Record pp. 135 to 223).

Fourth—The claim which was made by the plaintiff in error upon the hearing in the state court, upon which it sought the decision of the court.

This claim appears in the brief of plaintiff's counsel, Clark & Pearl, presented in the state court, a copy of which, with the consent of this court, will be filed with the clerk of the court, and to which reference is respectfully requested.

The position taken in the brief in reference to the title to the bed of the lake is distinctly this, viz: That such title was not conveyed by the patent of the United States government; that the conveyance of the patent was limited to the shores of the lake, as defined by the meander line of the government survey, and that the title to the bed of the lake was acquired under and by the state law of the state of Michigan.

Speaking upon this point, the brief says (page 6); "Further, the drafting of a patent and signing the same by the President, that proposed to convey any portion of an inland water, would be *nullity;* as neither the president, or the draftsmen, had any authority to convey more acreage than the "*fractional lots*" consisting of the upland, outside of the meander lines of the lake. It has been so held by the supreme court of the United States, and the supreme court of the different

states, to which decisions we refer below, and for the reason that from the time Michigan became a state, *it has been the owner of the inland lakes and rivers*, as ceded to the state by general government; as all inland lakes and rivers are by the law of the United States, made the property *of the state*, when it takes on statehood; and the purchaser of fractional lots abutting on inland lakes, purchasing from the United States government, acquires right and title to the land under the water abutting their ownership of the fractional lots as riparian owners, according to the rules of law *fixed by the state.*

Upon page 20 of the brief, the statement is: "That in making the patent, it was not the intention of the conveyancers to *disregard the provisions of law*, and include any of the territory covered by the lake (see p. 59 of Record); and showing that it was the intention to include that *only* which was outside of the meander lines, and that only the lots were included in the patent."

On pages 22 and 23 the statement of the brief is as follows: "It is beyond controversy that the supreme Court of the United States has held that the *state has control* of the waters of inland lakes and rivers, and according to the law of the state, those riparian rights were disposed of, and belong to adjacent owners."

"So it is apparent that *from the time Michigan became a state, it controlled the beneficial ownership of these inland lakes and rivers*, and they were vested *in the state* as held by the Supreme Court of the United States in the cases just cited. For that reason *the Land Department had no jurisdiction to transfer any of the territory under the lake or within the meander limits;* for, as said by the learned judge quoted above, *the territory had been previously disposed of and was so disposed of when*

the state was admitted into the Union, and it could only be controlled by the law of the state. That being so, no matter what may have been the intent of the scribe who wrote the patent or the President who signed the same there could be no conveyance of any territory within the meander lines of the lake, and of the territory submerged by the lake."

Then, after quoting from the case of Hardin v. Jordan, 140 U. S. 402, and referring to other authorities to sustain the above position, the brief says (pp. 26, 27) as follows: "As we have pointed out, the portion covered by the inland lake had *passed to the state*, when it ceased to be a territory, and became a state; and the disposition of that inland water was in accordance with the law of the state; and the question now is: *what is the law of this state as to riparian ownership upon inland lakes, ponds and rivers?*"

The italics are those of the brief.

The brief then proceeds to quote from decisions of the Supreme Court of the State of Michigan, and having done so, says (pp. 28, 29) "Further, by undoubted authority, the United States Government could convey no more than the amount of the lands outside of the waters of the lake, as the United States government *had no title to the territory under the lake, and no control over it.* That title and right of control *was vested in the state*, as shown by the authorities cited above."

The brief of Mr. Alfred Russell, counsel for the plaintiff in error in the state court, leave to file which with the clerk of this court is requested, takes the same position. It says (p. 20) "The law of the case, as to the division of the former bed of the lake, is, beyond question, settled by the late case of Ice & Coal Co. 102

Mich., 227, and Hardin vs. Jordan, 140 U. S. 371, disaffirming Clute vs. Fisher, 65 Mich."

The whole claim of the plaintiff before the state court was tersely summed up by Mr. Alfred Russell, counsel for the plaintiff, in his brief, on page 34, as follows:

"The whole jurisdiction in the case arises from the fact, (1), that three adjacent parcels of land, described in patents, are held by the three respective owners under purely legal titles; and, (2), from the fact that the *law of Michigan*, (not the grantor in the patents,) gives the grantees (as attached to those titles,) certain riparian rights in the center of the lake; and, (3), from the fact that the boundaries, not between the parcels of land granted, but between the apportioned riparian rights appurtenant to these parcels, become interlocking on account of the shape of the water bed and must be adjusted."

The case of Hardin v. Jordan, 140 U. S., 371, is cited in the plaintiff's principal brief of Messrs. Clark & Pearl, as deciding that the title to the bed of the lake is acquired not through a United States patent, but through the local law of the state, and unquestionably such is the law.

Barney v. Keokuk, 140 U. S. 402.
St. Louis v. Ritz, 138 U. S. 226.

The point is pressed upon the attention of the court that the plaintiff in error expressly repudiated any and all claim of title to the property in dispute through a patent of the United States government.

Fifth. **It is respectfully submitted from the foregoing review of the case made by the plaintiff in error, by its bill of complaint, its evidence, and its presentation to the state court, that no Feder-**

al right or title was set up or claimed in the state court to the property in controversy, nor was any Federal question there raised in such manner as to give jurisdiction to this court to review the judgment of the state court.

To give this court jurisdiction it was necessary for the plaintiff in error to specially set up the claim which constituted a federal question upon which it relied in this court for a review of the judgment in the state court.

Water Power Co. v. Street R'y Co., 172 U. S. 475, 488.
Oxley Stave Co. v. Butler County, 166 U. S. 648 at 658, 659.
Sayward v. Denny, 158 U. S., 180 at 183, 184.
Green Bay &c. Canal Co. v. Patten Paper Co., 172 U. S. 58 at 67, 68.
Capital Bank v. Cadiz Bank, 172 U. S. 425.
Chicago & Northwestern R. Co. v. Chicago, 164 U. S. 454, at 457.

In Sayward v. Denny, 158 U. S. 183, 184, it is stated that certain propositions must be regarded as settled, among which were that "the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way," and that the right on which the party relies, "must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed."

In Chicago & Northwestern Railway Co. v. Chicago, 164 U. S. (at page 457), the language of the court is: "This court has no authority to review the final judgment of the highest court of a state in which a decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege, or immunity protected by the constitution of the

United States, unless the party, against whom such judgment was rendered, 'specially set up or claimed' such right under that instrument. Rev. Stat. § 709.

"It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law, in violation of the fourteenth amendment of the constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts or either of them any right under the constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any federal right was specially set up or claimed in the supreme court of the state."

In Oxley Stave Co. v. Butler County, 166 U. S. (pp. 654, 655), the court referring to the words "specially set up or claimed" in section 709 of the Revised Statutes, says:

"These words were in the Twenty-fifth Section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially", that is, unmis-

takably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular State does not import that he is a citizen of that State. *Brown v. Keene*, 8 Pet. 112, 115; *Robertson v. Cease*, 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

The first suggestion of a right claimed by the plaintiff under the laws of the United States is made by the petition of the plaintiff to this court for the allowance of a writ of error. We quote the language of Mr. Justice Gray, in deciding the recent case of *Scudder v. Coler* (Oct. 19, 1899), as peculiarly applicable to this case.

"No mention of the Constitution of the United States or of any provision thereof, by the plaintiff in error, or by the Court is to be found at any stage of the case while it was pending in the courts of the State of New York; and it is impossible upon this record, to avoid the conclusion that it never occurred to the plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest court of the State."

Substitute "law" for "constitution" and "Michigan" for "New York" in this quotation and we have exactly the case at bar.

There is no opportunity for the inference to be drawn that a claim of title to the lake bed was set up as a Federal right.

The Decision of the State Court.

The contention of the plaintiff in error in this court is that in the State Court the complainant claimed the bed of the lake through patents of the United States Government and that the Court decided against such claim, and held that it had no title to the disputed territory, and that "*This is the real issue in this case.*" (Plaintiff's brief in this court pp. 9, 10, 11).

(*a*) We have shown above that the plaintiff did not claim title to the bed of the lake through patents of the United States; that it only claimed title through such patents to the lands bordering on the lake, which title was not denied or in dispute; that it claimed title to the bed of the lake, or property in dispute, under and by means of the local law of the state.

(*b*) The State Court did not decide or hold that the plaintiff did not acquire title under the United States patents to the shore of the lake, and it did not decide or hold that the plaintiff did not acquire title *to the territory in dispute*, nor did the court decide that the complainant owned no lands north of the section line.

The claims must have been made by the appellant, before the state court, under a law of the United States and the decision must have been adverse to that claim.

Church v. Kelsey, 121 U. S. 282.
Clark v. Penna, 128 U. S. 395.

Gray v. Coon, 154 U. S. 589.
Susquehanna Boom Co. v. W. Branch Boom Co. 110 U. S. 57.
Murdock v. Memphis, 20 Wall. 590, 635-6.
Simmerman v. Nebraska, 116 U. S. 54.

It must affirmatively appear from the record that a decision has been made on one or more of the questions specified in sec. 709 of the Revised Statutes, and in the way there mentioned, that is, against the claim made.

Detroit City R'y Co. v. Guthard, 114 U. S. 133.
Endowment & Ben. Ass'n v. Kansas, 120 U. S. 103.
Gray v. Coon, 154 U. S. 589.

The court made no decision against the plaintiff's original ownership of the disputed property.

The decision of the court appears in the Record (pp. 248 to 264).

A brief statement of the case is made in which it is stated that, "The three parties to this litigation own all the lands surrounding this lake; the complainant owning that part of section 15 bordering upon the lake."

The making of the agreement of March ~~7th~~ 17th, 1892, and the acts of the parties done in pursuance of and reliance upon this agreement are stated. After this statement follows the opinion.

The opinion of the Court begins with this statement (R. p. 254): "The theory of the complainant's bill is that the teritory formerly covered by the waters of this lake should be *divided* among the shore-owners in proportion to the amount of shore frontage owned by each; that such ownership extends to the center of the lake to be equitably established by the court; and that such territory should be partitioned by convergent lines drawn from the outside limit of each frontage to a convergent point called the equitable center. To

the bill is attached a map purporting to contain such equitable division."

The opinion shows that the result of such a division, "would give the complainant the entire southeast arm of the lake, and from two-thirds to three-quarters of the west arm."

The opinion then states the claim of each of the defendants in which an estoppel is asserted against the complainant's claim, and the opinion then states, in reference to the complainant's theory of the division as follows (R. p. 256):

"The difficulty in apportioning the territory according to the theory of complainant is apparent from its irregular form. It seems conceded by the learned counsel for the complainant *that the division according to the diagram, made a part of its bill, cannot be sustained*, because they concede that it may be more equitable to divide the two arms of the lake according to the river rule, viz: the medium *filum aquae*.

"It must also be conceded that the Cleveland Iron Mining Company under this rule would be entitled to some of the territory lying under the southeast arm of the lake south of the section line."

After stating the complications resulting from such a division, the opinion says (Record p. 257): "No fixed rule ever has been or ever can be laid down for the division of the territory covered by these inland lakes with their irregular shores. Each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible."

The court then refers to the testimony in which the equitable center noted on the complainant's map was established in the case, and refers to the testimony of the witness E. F. Bradt, who made the map, which testimony has been above quoted.

The court adds, after quoting from that testimony (Record p. 257): "This same witness also admits that the apportionment of his diagram deprives the C. I. M. Co. of any frontage on the southwest shore of lot 7.

"The above statement is sufficient to show *the difficulty in making an equitable apportionment*, and while nothing was said during the negotiations leading up to the agreement, or in the agreement itself, *in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three companies, and was so understood.* It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt.

Complainant had discovered a mine on its territory south of the line and extending under an arm of the lake. At that time it was the only one which it was known would be benefitted by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations to determine whether there existed, under the bed of the lake, ore worth mining.

"The contract, if valid, established the line beyond dispute.

"*The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this contract*, recognized as valid and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of Clute v. Fisher, 65 Mich. 48, as establishing the rule that the territory should be divided by the government lines, and that it rested upon that case as the estab-

lished law until the decision of Ice & Coal Co. vs. Ice & Coal Co., 102 Mich. 227, claiming that the latter overruled the former, and that in making that contract there was a mutual mistake which entitles it to the relief prayed."

The opinion then discusses this attempt on the part of the complainant to remove out of its way the obstacle of that contract, and states the conclusion of the court upon that subject, and decides upon the effect of the contract, as a valid contract (Record pp. 261, 262) as follows: "We are therefore of the opinion that this case does not come within any exception to the rule that a mistake of law does not furnish any ground for relief.

"Do the contract, settling the boundary line, and acquiescence therein and the acts done thereunder estop the complainant to now assert a different line? The rule is settled by the decisions of this court that where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and parties have for any considerable time recognized them, they will be upheld though title by adverse possession could not be maintained.

Joyce v. Williams, 26 Mich. 33.
Smith v. Hamilton, 20 *id.* 433.
Jones v. Pashby, 67 *id.* 459."

"According to the testimony on the part of the plaintiff, there was a dispute as to the boundary line. Mr. Kidder testified that the superintendent of the C. I. M. Co. asked him for a deed of the land lying north of the section line, and that he for his company declined to give it, making the same claim that he now asserts If his testimony be true, and for this purpose the company must stand by its own testimony, there

was a dispute and it was settled by the agreement. Complainant recognized it for nearly five years and saw all these expenditures made by the defendants without protest.

"Complainant, however, invokes the doctrine that title to land cannot rest on estoppel on account of the statute of frauds, and that a vote of three-fifths of the entire stock of the company is essential under the statute to convey title. The obvious reply to the first proposition is that it is also established that the statute of frauds does not apply to boundary lines, and that the doctrine of estoppel will be applied to the voluntary adjustment of disputed boundaries.

Hayes v. Livingston, 34 Mich. 384–380.

"Under the theory of complainant corporations could not settle boundary lines without a meeting of the stockholders called to pass upon the alienation of its lands, and the doctrine of estoppel could never be applied to a boundary line between corporations or between a corporation and an individual.

"So, too, in reply to the second proposition it may be said that the statute does not apply to the voluntary adjustment of these lines, but to alienation by deed of conveyance. Complainant was not alienating, dividing or selling any of its real estate within the language of the statute.

How. St., Sec. 4052.

"Alienation means in law a transfer of title by conveyance.

Webster.
The Century Dictionary and Cyclopedia.

"The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line even under its own theory, which could be measured by metes and bounds.

How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders.

"The contract was the act of the three parties to it. It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well as the defendants, paid out large sums of money under it. All are now estopped to deny its due execution and validity."

It is very clear that in the foregoing opinion of the court, the original ownership of the complainant, as well as of the defendants, in the bed of the lake was *assumed and recognized by the court*, and that the question dealt with by the court was *the theory of the complainant's apportionment*, and the obstacle in the way of that apportionment which was created by the agreement of March 17th, 1892.

The court dealt with the objections which were made by the plaintiff to that agreement, viz.: (1) That it was made under a mistake; (2) that title to land cannot rest on estoppel; (3) that a vote of three-fifths of the entire stock of the company is essential under the state statute to convey title.

None of these objections presented a Federal question. They were all overruled by the Court without reference to any Federal question.

They were disposed of by the court on the ground that the boundary lines of the disputed territory were unsettled, and for that reason a proper case was presented for the parties themselves, by contract, to establish the boundary lines between their respective ownerships; that the contract was a contract made for

that purpose, and that it was valid, notwithstanding the objections made thereto by the plaintiff.

The language used by the Court on page 262, above quoted, as follows: "*The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders,*" constitutes the entire claim of the plaintiff in error that the court decided a Federal question raised in the case by the plaintiff, and made such decision against the plaintiff's claim.

It is manifest that no such decision was made.

The language of the Court is only a statement made use of in showing that the boundary lines of the parcel of land claimed by the plaintiff were unsettled.

The statement of the Court is merely a statement of the theory of the plaintiff appearing in the bill of complaint, and in its evidence, viz: That the boundaries or division lines of the parcel of land in controversy were unsettled and required to be fixed, "either by mutual consent, or by determination of a court of equity."

This position of the plaintiff in reference to the boundaries has been stated above in quoting from the complainant's bill of complaint and evidence.

Attention is called to the language of the bill, on page 5 of the Record, in stating what was acquired of the lake bed by the Cleveland Iron Mining Company through the patent of the United States to Burnell, which has been before quoted. The bill says, "that said Burnell and his grantees have acquired no title to

the territory covered by said inland lake, except as acquired on account of their ownership of said lots 2, 3 and 7 of said fractional section 10, and lot 1 of said fractional section 11, so fronting upon said inland lake, and that said frontage ownership on said lake by operation of law, *and not by metes and bounds*, vested in said Burnell and his grantees the riparian ownership of said inland lake opposite said lots 2, 3 and 7 of said fractional section 10, and said lot one (1) of said fractional section 11, to the center of said lake, and a right to the land to the center of said lake, to a common point of ownership *to be equitably determined between all of the abutting owners upon said inland lake, either by mutual consent or by determination of a court of equity.*"

Here is the express statement by the bill of the theory of the bill, that the parties did not, by the patents under which they derived title to the shores of the lake, acquire *any specific piece of land in the lake bed which could be measured by metes and bounds* but that as riparian owners they had a right to land to the center of the lake which was to be determined equitably between all the abutting owners, *either by their mutual consent, or by the determination of a court of equity.*

The language of the opinion which is complained of is intended by the Court as a statement of the theory of the complainant, and the language follows the language of the bill of complaint itself upon that subject.

It is manifestly true, as stated by the Court, that upon the plaintiff's theory until such agreement was made, or a decree of the court of equity rendered, defining the boundaries, the complainant owned no specific piece of land *which could be measured by metes and bounds.*

In other words a piece of land whose boundaries

must be fixed by an agreement of the parties, or by a decree of the court, cannot be measured by metes and bounds before such agreement or decree is made.

Instead of the court deciding that the complainant had no title to that part of the lake bed north of the section line, the Court assumed that it had such title before the agreement of March 17th, 1892, was made. It is thoroughly settled by numerous decisions in Michigan.

First: that riparian owners on the border of streams or lakes own the submerged land in fee, to the center or middle line, of the stream or lake, as appurtenant to the riparian ownership.

Second: That parties may be estopped, by conduct, to repudiate a voluntary settlement of boundary lines they have made, though not evidenced by deed.

It ought not to be supposed that the Supreme Court of Michigan, by their decision in this case, intended to overthrow or disregard those rules, so long settled by their own decisions, unless such intent clearly appears from their opinion.

Both rules have long stood unquestioned, as the law of the state. It was not necessary, as assumed by plaintiff's counsel, to repudiate the first proposition, in order to sustain an estoppel as to boundary lines agreed upon.

The plaintiff, in its bill, claimed title to the center of the lake, to an undefined portion of the lake bed.

The Lake Superior Iron Company, by its answer did not deny that the plaintiff originally owned to the center, but alleged that the parties had made a division among themselves, which the plaintiff is now estopped to deny.

The Cleveland Iron Mining Company, by its answer, does deny that the plaintiff ever had title to any part

of the lake and and embraced in the east half of section ten, and also sets up the voluntary division, and the estoppel.

The court did not either directly, or by implication, decide against the plaintiff's claim, that ~~that~~ it acquired, by its conveyances, title in fee to the submerged land to the center, or middle, of the lake. In making the decision the court planted itself on that doctrine. In speaking of the pumping contract (Record p. 259), and assuming that the plaintiff relied on the decision in *Clute* v. *Fisher* in entering to that contract, the court says: "We find that the parties, in reliance "upon that case, entered into a deliberate contract es- "tablishing their *boundary lines* and determining the "amount of territory *belonging to each*. Complainant "made the contract with knowledge that it *gained ter- "ritory south of the line*, known to be valuable, while "*it surrendered territory north of the line*, not then "known to possess any value".

This statement asserts, and is based upon, the settled rule of law in Michigan, in relation to riparian rights that the *title* of riparian owners extend to the middle of the lake or stream.

Recognizing this title to the full extent claimed, the court decided that the parties, by their deed and acts, had made for themselves a different division. This was in no sense a decision of a Federal question, nor was it in any way founded upon the decision of a Federal question.

It matters not from what source the title was derived. The plaintiff claimed that the entire lake bed was owned in fee by the plaintiff and defendants, as appurtenant to their shore ownership, but that it was necessary that it be apportioned by agreement among the parties, or by the decree of a court of equity. Of

course, conceding such to be the case, the question of apportionment, and fixing the lines of each owner, could not be considered a Federal question.

The court did assume exactly that consideration of things, in fact asserted that such was the case originally, but held that the apportionment had been made, and the boundary lines had been defined, by the parties themselves, that the plaintiff was estopped to deny such settlement, and there was nothing left for the court to do. This was not a Federal question, nor did its decision rest upon the solution of any Federal question.

The Court then proceeds to show that the result of the complainant's contention would be the anullment of the contract and the substitution of another contract in its stead, which the Court declared it could not do, closing this part of the case in this language (R. p. 263):

"The Court must either affirm the contract in toto or wholly set it aside. The foundation of the contract was the settlement of the boundary lines and the division of the territory and apportionment of expense in accordance therewith. The Court cannot set it aside as to the boundary lines and reform or remake it upon an equitable division of the territory. If set aside, the contract is at an end and the lake must be left to fill up if either refuses to enter into a new contract. The L. S. I. Co. has discovered no valuable ore. It is willing to assume risks in the hope of finding ore. Though it has found none, it does not seek to avoid its agreement. To that agreement alone it can be held."

The fact will be borne in mind that all the parties were working and acting under that contract in carrying on their mining operations in the lake bed when this suit was brought, and that the continuance of the

contract in force is necessary to their mining operations in every part of the lake bed.

The attention of the Court is also directed to the fact that the foregoing portion of the opinion of the State Court has been directed not to the question of the title which either the complainant or the defendants acquired to the bed of the lake, but to the question of the division or apportionment between them of the lake bed, and the obstacle to that apportionment arising from the settlement of their boundaries by their contract, and their acts, which constituted an estoppel to the claim of the plaintiff for an apportionment. The entire opinion is based upon the assumption that the title of the parties was as claimed, and that an apportionment might have been made had the contract and their acts not disposed of the controversy.

After rendering the above decision, which was sufficient to dispose of the case on the ground of estoppel, the Court decided these further distinct questions, viz: That the complainant was without equity, and was guilty of laches, both of which questions were sufficient to dispose of the case.

The decisions upon these questions is as follows (R. pp. 263, 264):

"Complainant is entirely without equity. It doubted the correctness of the rule of Clute v. Fisher, and thought that a different rule might sometime prevail. It was then its duty to take steps to test the question before permitting defendants to enter into a contract and explorations involving over $100,000. It should at least have informed the defendants of its claim and given them the opportunity to make a contract with that in view.

"This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact

that the venture proved successful after large expenditure creates no equity for this complainant. The skill energy and money of that company developed a valuable property. It ought in justice to reap the benefit and the complainant ought to be estopped to participate in the benefit unless an unbending rule of law prevents.

Twin Lick Oil Co. v. Marbury, 91 U. S. 592.
Clegg v. Edmondson, 8 DeG. M. & G. 787.

It would not have offered to bear its share of the loss if unsuccessful nor could it have been compelled to.

"Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Every one is presumed to know the law. Therefore, it must be presumed to have known of the law enunciated in Ice Co. v. Ice Co. It had an able attorney who keeps well versed in the decisions of the courts of this State. Yet it waited two years and a half before asserting its claim, and still nine months after obtaining the opinion of its attorney that Clute v. Fisher was no longer the law. It waited until circumstances and conditions have so changed that it is impossible to restore the *status quo*. Decree affirmed with costs."

Seventh—The decision of the Federal question which the plaintiff presents in this court, that the plaintiff acquired title to the part of the lake bed claimed by it through the United States patent, was not necessary to the determination of the case, and therefore if it had been decided against the plaintiff it would not give jurisdiction to this court, to review the judgment.

The question of estoppel of the plaintiff to assert its title to the property in dispute, because of the contract of March 17th, 1892, and of the acts done under and in reliance upon it, did not depend upon the

source or means by which the plaintiff acquired its title, or ownership.

It could make no difference in respect to the validity of the agreement by which the parties undertake to settle the boundaries of their respective ownerships of the bed of the lake, that their title to the lake bed was acquired through a patent of the United States, or through the common law of the state, or through a patent from the state.

It was, therefore, not necessary to decide the Federal question in order to hold, as the State Court did hold, that the plaintiff's agreement estopped it to assert its title to the property in dispute. Neither was the decision of a Federal question necessary to the determination of the case on the grounds that the plaintiff was "entirely without equity", and "was guilty of laches". Those grounds arose from the plaintiff's own acts.

Whether the State Court decided these questions as this Court would have decided them had they been presented to this Court, can not be considered upon this hearing.

The only question here is whether these questions, as they were decided by the State Court. were sufficient to dispose of the case.

Pierce v. Somerset Railway, 171 U. S. at 648, 649.
Enstis v. Bolles, 150 U. S. 361 at 369.
Kennebec v. Portland R. R. 14 Wall. 23.
Klinger v. State of Mississippi, 13 Wall. 257.

In the above case of Pierce v. Somerset Railway a Federal question was raised, but like the present case was disposed of by the State Court on the ground of estoppel.

The opinion of the Court says (p.648): "It is thus "seen that there were two questions determined by the

"state court: One related to the validity of the statutes "passed subsequently to the execution of the mortgage, "the court holding them valid, and that they did not "impair the obligation of the contract contained in "the mortgage. That is a Federal question. The other "related to the defence of estoppel on account of laches "and acquiescence, which is not a Federal question. "Either is sufficient upon which to base and sustain "the judgment of the state court. In such case a writ "of error to the state court cannot be sustained. "*Eustis v. Bolles*, 150 U. S. 361; *Rutland Railroad v. "Central Vermont Railroad*, 159 U. S. 630; *Seneca Na- "tion v. Christy*, 162 U. S. 283.

"A person may by his acts or omission to act waive "a right which he might otherwise have under the "Constitution of the United States as well as under a "statute, and the question whether he has or has not "lost such right by his failure to act, or by his action, "is not a Federal one.

"In the above case of Eustis v. Bolles, 150 U. S. 361, "368, the State Court held that by accepting his divi- "dend under the insolvency proceedings Eustis waived "his legal right to claim that the discharge obtained "under the subsequent laws impaired the obligation "of a contract. This court held that whether that view "of the case was sound or not it was not a Federal "question, and therefore not within the province of "this court to inquire about."

County of Adams v. B. & M. R. R., 112 U. S. 123.
Allen v. So. Pac. R'y. Co., 173 U. S. 479.
Capital Nat'l Bank v. First Nat. Bank, 172 U. S. 425.
Dewey v. City of Des Moines, 173 U. S. 193.

To give this court jurisdiction the claim made under a law of the United States before the State Court must be a real and and not a fictitious claim.

In the case of Hamblin v. Western Land Co., 147 U. S. 531, Mr. Justice Brewer says:

"A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of the state courts. Millinger v. Hartupee, 6 Wall. 258; New Orleans v. Water Works Co., 142 U. S. 79, 87. In the latter case it was said that 'the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay'."

The assertion of a claim of right under the laws of the United States made before the state court without color of foundation would not, it is submitted, entitle a party to a review of the question in this court.

It seems to have been considered in some cases that where a party expressly asserts a claim before a state court, that land submerged under navigable waters were covered by a patent or grant of the United States, constituted such a claim of right under a law of the United States as to entitle the claimant to an appeal to this court in the case of an adverse decision. This was the case in Shively v. Bowlby, 152 U. S. 1; Railroad Co. v. Schurmeir, 7 Wall. 272, and Packer v. Bird, 137 U. S. 661. In each case, however, it was held that the claim was not well founded and could not be sustained; that the question of title of the patentees to the submerged lands depended entirely upon the law of the state as expounded in the courts of the state. In

each case this court affirmed a decision of the state court, upon the ground that the question was governed by state law and that the decision of the state courts on the subject was conclusive.

Again, the doctrine was affirmed in the case of G. R. & I. R. R. Co. v. Butler, 159 U. S. 87. The law of Michigan and the decisions of the Michigan courts were held to govern the question.

In the later case of St. Anthony's Falls Water Power Co. v. Board of Water Commissioners, 168 U. S. 349, this court made an extensive review of the cases and held that it is the well and thoroughly settled doctrine in this state that the question of riparian rights and their extent in such cases is entirely a matter for the decision of the courts of the state.

It would seem that, in the light of these decisions, it can no longer be said that there is any color of ground for the claim set up in this case and that if a review of the decision of the state court on this subject can be had in this court, then "a federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay."

II.

If a Federal question was raised and decided by the Court, it was correctly decided, and the other questions decided are not subject to review by this Court.

It is now claimed by the plaintiff that the patents of the United States, by which its land bordering on section 15 was conveyed to its grantors, conveyed to the

patentees a title to a portion of the bed of Lake Angeline. It is insisted (contrary to the fact as we have shown) that that claim was asserted before the Supreme Court of Michigan and that the decision was adverse to such claim.

As a matter of fact the Michigan Supreme Court did not decide that such title was not vested in the grantors of plaintiff by their patents. It held, or assumed, that the plaintiff had such title in fee and that it might be parceled or divided among the several owners in accordance with the laws of the state, but for the fact that they had parceled and divided it among themselves.

If the Michigan court had decided that the title or right of the several parties in the lake bed was not a legal title but a mere equity; or if the court had held that none of the riparian owners had any title to the land submerged by the waters of the lake, such decision would not, or could not be questioned by this court. It has been thoroughly settled by the decisions of this court, as before stated, that the rights of riparian proprietors depend upon the law of the state as expounded by its courts.

III.

THE CASE WAS CORRECTLY DECIDED BY THE MICHIGAN SUPREME COURT, AND IF THIS COURT HAD JURISDICTION TO REVIEW THE ENTIRE CASE THE DECREE SHOULD BE AFFIRMED.

ESTOPPEL.

The plaintiff is estopped, by conduct as well as by deed, to claim any rights in the lake bed, north of the south line of section ten, except such surface rights as are appurtenant to its ownership of the surface of lot six, purchased from the Lake Superior Iron Company.

So far as dealings between the Lake Superior Iron Company and the plaintiff are concerned, we need not go back of the execution of the pumping contract, except to call attention generally to the fact that the plaintiff in 1886 had openly abandoned its claim to territory lying north of that line, acquiescing in the dictum of the court in *Clute v. Fisher*, by removing all its buildings of any value across the line, and also to the fact that mining operations carried on by the complainant and the Cleveland Iron Mining Company had for some time been carried on with entire reference to the section line as the boundary, which fact was known to the Lake Superior Iron Company; all of which had a tendency to confirm the latter company in the understanding that all claim north of the section line was abandoned prior to the time of making the pumping contract.

It is true as said by counsel, that the primary object of the pumping contract was to drain the lake, for the benefit of the three companies interested. In arriving at the terms of that contract and apportioning the expense, and particularly in providing for the permanent drainage of the lake, the extent of the ownership of the several parties was a material question necessary to be determined. The terms of this contract and the apportionment of the expense would naturally depend largely upon three questions:

1. The particular portions of the lake bed owned by each of the parties.

2. The quantity of water to be removed therefrom, and also the quantity likely to flow into the respective parts in the future.

3. The estimated or supposed relative value of these three portions of the lake bed.

The second and third of these questions depend entirely upon the determination of the first. We cannot conceive of the three parties entering into a contract of this kind without first determining what particular portions of the lake bed each owned.

This had all been practically determined and, tacitly at least, admitted and acted upon long before. In the ordinance which they prepared to be passed by the common council of the city of Ishpeming, they set forth definitely and particularly the portion of the lake bed which each claimed to own. This must have been done for the purpose of showing upon the record that the question of ownership had been definitely settled and determined upon, for it was not necessary to recite it in the ordinance for any other purpose. They caused a petition to be signed by their respective agents, asking the council to pass that ordinance.

It is not claimed that this document, signed by the

agents, would be of itself an authoritative settlement of this question, but the respective companies must be supposed to have known of this petition and to have based their subsequent action upon it. The petition was presented and the ordinance passed on the 16th of March, 1892 (R. p. 198). Immediately afterward the pumping contract was prepared and executed by the Cleveland Iron Mining Company on the 17th of March. It was executed some time later by the Lake Superior Iron Company, as before mentioned, and finally by the plaintiff August 20 and 22 (R. p. 94). That contract contains a direct recognition of the conceded fact that all the iron ore which the plaintiff was entitled to take out of the bed of the lake lay south of the line of section ten.

We have said it was impossible that the plaintiff should have been ignorant of the petition which its agents asked the Ishpeming council to pass, at the time of the execution of this contract several months later. The very fact that by the contract it was conceded that the ore which it was entitled to lay south of the section line, and that the contract was nevertheless executed without question, is conclusive that the plaintiff knew of the basis upon which the contract was made.

The contract was executed by the companies under their corporate seals. It cannot be claimed that this contract was unauthorized, or even that the evidence fails to show that it was authorized. The *plaintiff by its bill* alleges that it and the defendants, within the last five years, have shared the expense of pumping out and draining the lake, stating the proportions contributed by each to the expense. This is alleged as *the act of the plaintiff* as well as the defendants, and must be taken as lawfully authorized. This, as the proof

shows, was done by *virtue of the contract* mentioned. We have here an admission by the bill that this act was duly authorized and was the act of the plaintiff.

Besides, the contract was introduced in evidence *by the plaintiff*. It was introduced in evidence as, what it purported to be, *a contract between the plaintiff and the defendants*, and not a contract between unauthorized agents or officers of the plaintiff and the defendants. It would be strange if a party introducing a contract of this kind could afterwards object that there is no affirmative evidence of the execution of the contract.

In addition to this, as stated, the contract is under the *corporate seals* of the several companies. The seal itself, without the aid of any statute, would be *prima facie* evidence of the authority of the officers using it to execute the instrument and affix the seal. The statute of Michigan, Act 162 of the laws of 1893 (Compiled Laws of Michigan, 1897, vol. 3, sec. 10196) goes further and provides that when such seal is affixed to an instrument purporting to be executed by a corporation, the seal "shall be prima facie evidence of the *due adoption* of said seal and that it was affixed to said instrument by *due authority*, and that said instrument was in fact *lawfully executed* by such corporation." (See foot note.)

Counsel in their brief cite the Michigan statute requiring a three-fifths vote of the stockholders to authorize the *alienation of land* by mining companies,

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NOTE.—The entire section quoted from is as follows: "(10196) Sec. 1. The People of the State of Michigan, enact, That any corporation, joint stock company, or partnership association, limited, may have a common seal which it may alter at pleasure, and that such seal affixed to any instrument purporting to be executed by any such corporation, joint stock company or partnership association, limited, foreign or domestic, shall be prima facie proof of the due adoption of said seal, and that it was affixed to said instrument by due authority, and that said instrument was in fact lawfully executed by such corporation, joint stock company or partnership association, limited."

and insist that there is no proof that such authority was given in this case.

It is also asserted that the proof of such authority can only be given in a certain way.

The Michigan statute provides that a person may, by procuring and recording certain proofs, perpetuate evidence of the facts upon which the validity of a conveyance of real estate by the corporation depends. There is nothing, however, in the statute, which excludes any other competent proof, and the statute of Michigan passed since the act restricting the power of corporations to alienate real estate, provides that the corporate seal shall be evidence of due authority. The instrument was produced in evidence by the plaintiff, bearing its corporate seal. By the terms of the statute the seal was prima facie evidence of its adoption by the company and that the instrument was lawfully executed. Besides, the plaintiff's witness testified that this was the contract of the company, and this was admitted by defendants' counsel; and upon such testimony and admission the contract was offered in evidence by the plaintiff (Record p. 88.)

No attempt was made to rebut the presumption so raised, and therefore the authority of the officers to execute the instrument is conclusively established.

Up to the time of the making of this contract, according to nearly all the testimony, the Pittsburgh and Lake Angeline Iron Company had never claimed anything north of the section line, and the Cleveland Iron Mining Company and the Lake Superior Iron Company claimed nothing south of that line. No question had ever been raised between the parties as to the boundary line, or any doubt raised over the correctness of the line so assumed, so far as appears by any evidence, except the testimony of Mr. Kidder as to

one interview between himself and the superintendent of the Cleveland Iron Mining Company, in which he was asked to recommend his company to quit-claim all interest in the bed of the lake north of the line and take a quit claim from the Cleveland Iron Mining Company of all interest south of the line, which he says he emphatically refused to do (R. p. 109). This was some years before the question of joint action in pumping out the lake was raised. If this testimony of Mr. Kidder has any bearing at all, and is found to be correct, it shows that there was some question or doubt as to the rights of the parties, although they acted entirely upon the supposition that the section line was the accurate dividing line.

The fact, if it was a fact, that the parties were not entirely agreed as to their rights in that respect strengthens our position that the pumping contract constituted a final settlement of all such questions. It shows that if the Pittsburgh and Lake Angeline Iron Company prior to that time had some lingering idea of making claim to some portion of the bed of the lake north of the section line, it was entirely waived, given up, and all questions relating to it settled by the execution of this contract.

The Pittsburgh and Lake Angeline Iron Company was particularly anxious to have the lake drained, and proposed, if no other arrangement could be made whereby the expense should be shared between the parties upon some agreed basis, to build a cofferdam along the section line and pump out the water from its portion of the the lake, lying south of the line, for its own benefit. Some negotiation and discussion occurred on the subject of apportioning the expense. The area of the lake bed claimed by the plaintiff was comparatively small, and the amount of water to be

removed from that portion of the lake was much less than its proportion of the area, for the reason that the water there was shallow. It had no particular interest, as it claimed, in keeping out the water and mud from the deeper parts of the lake, because they were not interested in the lake bed at those points.

The justice of the position taken by the complainant was recognized, and its share of the expense of pumping was fixed on that basis. While the Lake Superior Iron Company was to pay four-fifteenths of the original cost, the complainant was to pay but three-fifteenths.

Of the expense of removing the thin mud that had settled in the central part of the lake, the complainant declined to pay the proportion it had agreed to pay of the cost of drainage, for the reasons above mentioned.

It cannot be supposed that this contract, requiring the defendants to pay so large a proportion of the original expense of draining, and to pay the entire expense of permanent drainage of the main body of the lake, would have been entered into if the complainant at that time had asserted ownership in all that portion of the lake bed it now claims.

The Lake Superior Iron Company would not have agreed to pay a larger proportion of the pumping contract, than was to be paid by the plaintiff if the plaintiff had at the time insisted that it was the owner of 29.43 per cent of the lake bed, to an ownership of 24.36 per cent by the Lake Superior Iron Company (Record p. 41).

Neither would it have assumed to share with the Cleveland Iron Mining Company the entire expense of permanent drainage of the central part of the lake if the complainant had asserted that it was the owner of a considerable portion of the lake bed extending to the center.

Let us refer again to the provisions of the contract. (Record p. 88).

It recites that the three parties *severally* own all the lands surrounding Lake Angeline (there is no claim of joint ownership or ownership in common requiring a partition); that iron ore has been discovered under the bed of the lake, and that it has become necessary to pump out the water of the lake and *permanently* drain *thereafter* the bed thereof, in order that each of the parties may economically mine such ore as lies under such portions of the bed of the lake as *each* of the parties is *respectively* entitled to. This recital shows that each of the parties owns a *distinct* portion of the lake bed and that that portion is *well defined*, that is to say, fixed and determined by the agreement of the parties, and evidenced by the contract itself.

The cost of pumping under the contract is stated, and the contract definitely apportions the amount to be paid by each company. No difficulty or doubt is suggested as to such portion. The contract, however, recites that it is necessary to proceed at once with the work in order to get the pumping done for the price named, and that the cost of the continuous drainage of the bed of the lake, after the water is once pumped out, is impossible of ascertainment, and the parties are desirous of fixing the *proper proportion* of the expense of such continuous drainage, as well as of the purchase of apparatus for pumping the water in the first place.

In consideration of the premises and of the mutual promises of each, the several parties agree as to the proportions of the contract price they are to pay respectively.

The Cleveland Iron Mining Company agrees, after the lake is pumped out, to maintain and operate the plant, to keep the lake permanently drained, advancing

all the necessary funds to carry on the work and keep the apparatus in repair, and the expense is to be apportioned between it and the Lake Superior Iron Company, the Pittsburgh and Lake Angeline Iron Company being relieved entirely from any part of that expense.

The Lake Superior Iron Company agrees on its part to pay its proportion, as so fixed, of the cost of pumping, also the cost of permanent drainage, and of the purchase of additional apparatus for that purpose.

The Cleveland Iron Mining Company and the Lake Superior Iron Company, it will be seen, agree with the Pittsburgh and Lake Angeline Iron Company to keep the lake permanently drained, and they cannot relieve themselves of that obligation so long as the latter company shall desire the drainage to continue.

The plaintiff agrees merely to maintain a flume to "divert and carry away all the surface water, or other surface drainage, which would come into the present bed of said lake from all the land lying above the present water level of said lake and south of the south line of section ten as projected through said lake; and also to run into said flume any and all water which the said third party may pump from its mine or mines;" it agrees to maintain said flume and keep it in repair and in successful operation "until the iron ore to which said third party is entitled, *lying on, in or under the portion of the bed of said lake lying south of the south line of said section is mined and exhausted*," after which it is not required to incur any expense whatever towards the drainage of any part of the lake or keeping the water out, but merely to turn over the flume to the defendants and allow them to operate it at their own expense.

Here is not only an express admission that the ore which the plaintiff is entitled to lies south of the

section line, but an express exemption of the plaintiff from liability for any share of the expense in *draining any other part of the lake bed.* If the claim of the plaintiff can be maintained and the contract remain in force, the plaintiff may, after having exhausted the ore in the lake bed south of the section line, turn over the flume to the defendants to operate at their own expense, and still insist on the defendants continuing the drainage of the lake bed, while it is engaged, perhaps for a long term of years, in mining out the iron *ore north of the line*, and without contributing anything itself to that expense, and that, too, even though the defendants long before that time may have exhausted the iron ore lying under their portions of the lake so as to have no further interest in keeping the lake drained. Such a result cannot have been contemplated by the parties.

The apportionment which has been made of the expense of pumping and keeping the water out is based upon the apportionment of the bed of the lake which was made by the parties, and such apportionment is as much a part of the contract as the apportionment of the expense of pumping and draining. It is impossible to set aside those provisions of the contract which define the portions of the lake bed to which each party is entitled without abrogating the entire contract for keeping the lake pumped. The latter cannot stand without the former.

It is urged by the plaintiff that, as the apportionment of the lake bed was entered into by it in ignorance of its legal rights, that portion of the contract should be disregarded.

Its bill is not framed upon any allegation that the contract was entered into by mistake and ought to be set aside. The plaintiff is not seeking any such

result, first, because it has not made any case in its bill for such relief; and second, it proceeds upon the theory that the contract, so far as the pumping is concerned, is still in force. It merely asks the court to disregard that portion of the contract which relates to the division of the lake bed, leaving the other portions of the contract, which were founded upon that division, in full force. It asks the court to reapportion the lake bed between the parties, leaving the contract for the perpetual drainage of the lake at the expense of the defendants, in force. The inequity and absurdity of such a result is too apparent upon the face of it to require argument.

The plaintiff's counsel, on the hearing in the State Court, conceded that the expense of pumping ought to be re-adjusted, and virtually asked to have the contract set aside as to that expense, and re-formed (see opinion of State Supreme Court, Record p. 262, bottom).

But the bill is not framed with a view of re-forming the contract. If it were, such relief, under the evidence in this case could not be granted.

It is a well settled principle that a court cannot make a contract for parties. It can correct a contract so as to make it what the parties mutually intended it to be, but no court has ever undertaken, on ascertaining that a contract was made as the parties intended it to be, under a mistake of the facts, to reform it and make it what the parties probably would have made it if they had correctly understood the facts. As we have before stated, the area of the respective holdings in the lake bed alone would be no guide to the proper apportionment of the expense of pumping. Other considerations combine to affect the result, and the court cannot find from the evidence produced, or even evidence that can be produced, the

exact effect those considerations had in arriving at the result.

But, suppose that the plaintiff was before the court with a bill stating the facts as it claims them to exist, asking the court to set aside the entire contract on the ground of mistake, and offering to restore, so far as it could, all that plaintiff had taken under the contract and to place all parties in *statu quo*. What would then be the condition of the parties?

First. It would be necessary to restore the iron ore it had taken from that part of the lake bed which confessedly belongs to the Cleveland Iron Mining Company. Even if the payment of the value would answer the purpose, it is not susceptible of accurate ascertainment.

Second. It is impossible for the plaintiff to put the parties in *statu quo* with respect to the expenses of exploring which they have incurred. The cost might, perhaps, be approximately estimated, but no reimbursement of the cost of exploration would now answer. Those expenses were incurred without any secured beneficial results. The defendants assumed all the risk of such expenditure and assumed the risk upon the well understood and clearly expressed understanding and agreement of the parties concerning their respective shares of the lake bed. If the explorations had been unsuccessful and developed no value, there is no way in which the plaintiff could have been required to pay the expense, or any part thereof. There is no rule of equity which will allow one to wait until the expense has been incurred, and the risk and the enterprise has proved successful, and then claim the benefit of the enterprise by sharing the expenses, without having assumed any part of the risk.

Twin Lick Oil Co. v. Marbury, 91 U. S. 592.

Third. All agreement for the permanent drainage of the lake would have to be wiped out. The immense expenditure that has been made by all the parties to open mines in the lake bed, in reliance upon this permanent continuous pumping contract, must be lost, and the mines destroyed, unless the parties can agree upon a new arrangement for the continuous drainage of the lake. The court is powerless to make such new agreement for the parties. Not only is either of the three parties at liberty to refuse to contribute any part of the expense of such pumping, but any one of them is at liberty to refuse to allow the pumping to go on. With the contract entirely abrogated, either party has a right to the water and to demand that the pumping stop and the lake be allowed to fill.

It follows, therefore, not only that the plaintiff is not offering to restore the parties to their original condition, but that it is absolutely impossible so to restore them.

After the execution of the pumping contract, the division of the lake bed, as agreed upon by it, was acted upon and recognized by all the parties continuously, at least down to September, 1896. These acts of the local agents and superintendents are shown, not because the agents could by their acts alone affect the title to the property of their companies, but their acts in the prosecution of the business of their companies, and in pursuance of their authority, are referable to the contract. It must be assumed that their authority extends to the carrying on of the mining business upon the property owned by their respective companies. In carrying on such mining business, and observing the lines fixed by this contract, they were within the sphere of their authority carrying out the contract made by the companies themselves. In so doing the

defendants, relying on the contract, have placed themselves, in a position whereby, if the contract is now to be set aside, in whole or in part, they must suffer great and irreparable loss, and loss which cannot in any way be compensated.

As we have said, the establishment of the boundary lines between the lands of the respective parties was necessarily involved in the pumping contract, and was as much a part of it as if it had been fully expressed therein. On the strength of it the defendants entered into and executed the contract, and proceeded to explore and develop the mines under their respective portions of the lake bed, as so established.

It is not a case where parties have merely established their boundaries under a mistaken view of their rights, and where, after one of the parties finds that he has acted under a mistake, seeks to be relieved from the results of such mistake.

In reliance on the understanding by which the lines were established the defendants have entered into a contract whereby they are bound, so long as either party shall require it, to keep the water out of the lake bed at their own expense. They have fully performed the contract, so far as the removal of the water is concerned, and have for several years kept up the permanent drainage. Not only that, but, in reliance on the same arrangement they have developed mines under the lake bed, which are worthless unless their value can be preserved by the continuous and permanent drainage to be kept up under this same contract. The Lake Superior Iron Company has not only expended money in sinking drill holes for the purpose of exploration in the now disputed territory, but has opened and developed a body of ore, at great expense, mostly on its undisputed territory under the lake bed, in reliance on

the continuance of the drainage under this contract (Record pp. 136 to 142, 147). If the contract is set aside by reason of the alleged mistake, this mine becomes worthless, unless the parties can arrive at another agreement—first to permit the permanent drainage of the lake, and second to make an equitable apportionment of the expense.

But a party seeking to be relieved from a contract on the ground of fraud or mistake must act promptly, and before the conditions have changed so that a rescission will work serious injury to the other party.

Disbrow v. Jones, Har. Ch. 102.
Street v. Dow, Ibid. 427.
Carroll v. Rice, Walk. Ch. 373 at 378.
DeArmund v. Phillips, Ib. 186 at 198.
Campau v. VanDyke, 15 Mich. 371-377 et seq.
Russell v. Miller, 26 Mich. 1.
Harlow v. L. S. Iron Co., 41 Mich. 583-589, and cases cited at p. 589.

The complainant, by inducing the defendants to expend these large sums of money, not only for drainage, but for explorations and development, in reliance on the agreement, and that upon the understanding that the boundary lines had been established, and that the plaintiff would claim nothing beyond such lines, is estopped to deny the right of the defendants to remove the ore from their portions of the lake as so determined.

Dickinson v. Colgrove, 100 U. S. 578 at 580.
Kirk v. Hamilton, 102 U. S. 68 at 76 to 79.
Maxwell v. Bay City Bridge Co., 41 Mich. 453, at 466 and 467.
Cleland v. Casgrain, 92 Mich. 139 at 153.
McVicker v. Filer, 31 Mich. 304 at 308.
State v. F. & P. M. R. R. Co., 89 Mich. 481 at 487.
2 Herman on Estoppel, Secs. 932 to 936, and 954.

It is not necessary to our defense that the legal title to the bed of the lake passed to the defendants by the

acts which constitute an estoppel, so that the title could not now be asserted by the complainant in an action of ejectment, or other action at law, as in the cases of Wood v. Railroad Co., 90 Mich. 34, and Hayes v. Livingston, 34 Mich. 384.

The question here arises upon a *bill in equity*, filed by the plaintiff for the purpose of obtaining a decree setting off to it those portions of the lake bed which it has surrendered, both by deed and by a long course of conduct, and thus to avail itself of the benefits of the explorations and developments which have been made by the defendants, upon the understanding with the plaintiff that they were made upon lands to which the plaintiff made no claim of title.

Under the decision in the case of Clute v. Fisher the plaintiff may have understood that its ownership in the bed of Lake Angeline was confined within the lines of section fifteen (15), extended across the lake, and, acting on that understanding, entered into the pumping contract, and acted under it for several years, giving the defendants to understand that it made no claim beyond those lines, and so encouraged them to expend money in the drainage of the lake and in making explorations in the lake bed for iron ore, but the plaintiff had the right to question that decision—to decline to act upon it, as not expressing the law of the land, as was done in the case of Grand Rapids Ice and Coal Co., 102 Mich. 227.

The plaintiff, for the purpose of closing a contract which it greatly desired, and which would be highly beneficial to it, without incurring the expense and delay of a contest over the question, chose to assent to the rule as announced in Clute v. Fisher, and to act upon it as defining the limit of its rights, closed the contract, proceeded at once to realize

the benefits of it, and allowed the defendants to make the large expenditures shown by the record, upon the understanding that all the ores discovered north of the section line would belong to the defendants.

For the plaintiff to change its position now, after all this expenditure has been made, and the ore discovered, and to appropriate the fruits of such expenditure, and of such exploration and discovery, and deprive the defendants of the benefits thereof, would be to work a fraud upon the defendants which a court of equity will not help to accomplish.

A party will not be permitted to recover lands which he had encouraged another to occupy and improve, even where the encouragement was given under the influence of a mistake and in ignorance of his own better right.

2 Herman on Estoppel, Sec. 954, and cases cited in note 4.

It has been insisted that the doctrine of estoppel as claimed by us has been repudiated by the Michigan Supreme Court, and the leading case of *Hayes v. Livingstone*, 34 Mich. 384, has been cited to support that claim.

That was an action of ejectment and depended solely on the legal title. Mr. Justice Cooley, in reviewing the cases which were relied on to support the estoppel, on page 390, cites a number of cases which he says do not apply, because they were "either cases in equity or cases in which, under permission of the statute, an equitable defense was relied upon." After citing the cases, he says: "These cases have no necessary bearing, *and their correctness may be conceded.*"

Let us see what those cases, whose "correctness may be conceded," hold.

In the case of *Wendell v. Van Rensselaer*, 1 Johnson

Ch. 344, it was held that a party, by concealing his title to real estate might be estopped to set up such title against a person who purchased the same with his knowledge, and the court says (p. 354): "There is no better principle established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person".

In the case of *Storrs v. Barker*, (6 Johnson's Ch. 166), a bill was filed to restrain the defendant from prosecuting an action of ejectment. The defendant had purchased from the legatee of a married woman, who, under the law of the state at that time, was not competent to make such devise. The plaintiff in the ejectment suit was the father of the testator and claimed as her heir, although he had advised the complainant to make the improvements and exercise acts of ownership upon the land for a few years before he set up his claim, he, in the meantime, being ignorant that his daughter's will was void. It was held to be the rule of equity "that where one, having title, acquiesces, knowingly and freely, in the disposition of his property, for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by that disposition of the property, and especially if he encouraged the parties to deal with each other in such sale and purchase."

It was further held by the court that his ignorance of the law did not interfere with the operation of the rule, and the court, after discussion of the question,

concludes (p. 170): "It would seem, therefore, to be a wise principle of policy that ignorance of the law with knowledge of the fact cannot generally be set up as a defense; and it appears to be settled by a course of equity decisions, that ignorance of one's legal right does not take the case out of the rule, when the circumstances would otherwise create an equitable bar to the legal title."

In the case of *Tilton v. Nelson*, 27 Barb. 595, which was an action under the code by which the court had jurisdiction of equitable defenses, the court held that a party having the legal title might estop himself by a course of conduct from setting up a legal title. In that case also the party estopped claimed to have been acting under a mistake of law, and it was held that his ignorance of his rights would not interfere with the estoppel. It was said by the court (p. 605): "When a party procures, or even acquiesces in, the disposition of his property by another under color of title, and pretending to title, he shall be bound by such disposition, and shall be presumed to know the law so far as it is applicable to the case."

In the case of *Snodgrass v. Ricketts*, 13 Cal. 359, a party was held estopped by conduct to set up a title to real estate. The doctrine is stated by the court as follows (p. 363): "If one man makes a bargain with another for land, the latter claiming the title and the right to sell it, and this is done in the presence and at the instigation of a third party who has the title, is not the third party estopped from setting up the title as against the purchaser? We think he is and that all persons in privity with such third person are likewise estopped unless they are purchasers for valuable consideration without notice."

In the case of *Fay v. Valentine*, 12 Pickering 40, a

bill was filed to redeem mortgaged premises. The defendant had purchased from a prior mortgagee after condition was broken, and before purchasing the plaintiff had declared to him that he never would redeem the land because it was not worth more than the amount for which it was mortgaged. To the claim on the part of the defendant that he was estopped from insisting upon his right to redeem, it was urged that the interest of the mortgagee can never be transferred or relinquished by parole. To that claim the court says (p. 44): "Most certainly it cannot, but no party, whatever may be his interests or legal rights, can have relief in a court of equity unless his claim is founded on the basis of good faith and justice. It is a familiar rule that he who seeks equity must do equity. He must not expect the aid of a court of equity to sanction the violation of his engagements although there may be no legal means to enforce them, nor will he be allowed to profit by the mistakes of another, caused by his own misrepresentations or concealment, nor can he be allowed to set up the statute of frauds for the purpose of protecting fraud."

In the case of *Foster v. Bigelow*, 24 Iowa 379, the same doctrine is held and is stated as follows: "Plaintiff's silence as to his title, his acquiescence in the possession of the defendants, and his passive permission of the improvements, will, in equity, estop him from setting up the title he has so long failed to assert, if, indeed, he has not purposely concealed it."

It will be seen that, in expressly recognizing the correctness of these cases, the court, in the case of *Hayes v. Livingston*, did not deny, but rather affirmed, the right of a court of equity to apply the doctrine of equitable estoppel, even to assert title to real estate.

But this is a case relating to *boundaries*, rather than title. The *title* of the respective parties to the lots conveyed to them respectively constituting the border of the lake, has never been disputed. The only question that ever required adjustment was the *boundaries* of those lots, including the portions of the lake bed appurtenant to them. Those boundaries were settled by the contract, understanding, and course of conduct of the parties. In the case of *Hayes v. Livingston* (34 Mich. 390), Mr. Justice Cooley cites the following cases in which the doctrine of estoppel was applied to a voluntary adjustment of boundaries between contiguous estates:

Robinson v. Justice, 2 Penn. 19,
Speller v. Scribner, 36 Vt. 245.
Halloran v. Whitcomb, 43 Vt. 306.
Merriweather v. Larmon, 3 Sneed 447.
Spears v. Walker, 1 Head. 166.
McAfferty v. Conover, 7 Ohio St. 99.
Gove v. White, 23 Wis. 282.

He then adds: "The principle of these cases has been approved in this state," citing:

Reed v. Drake, 29 Mich. 222.
Stewart v. Carleton, 31 Mich. 270.

To which we will add:

Smith v. Hamilton, 20 Mich. 443.
Joyce v. Williams, 26 Mich. 332.
Cronin v. Gore, 38 Mich. 381.
Diehl v. Zanger, 39 Mich. 601.
Dupont v. Starring, 42 Mich. 492.
Burns v. Martin, 45 Mich. 22.

See also:

Brown v. Wheeler, 17 Conn. 345 at 352 et seq.
Kinney v. Farnsworth, Ibid, 360-361.

The complainant is estopped also on the ground that a license was given by it to the defendants to explore for ore for the purpose of discovering and removing

the ore, and upon such license a large expenditure has been made, by means of which ore has been discovered. The license is not revocable after such expenditure and discovery of ore has been made.

Marble v. Whitney, 28 N.Y. 297 at 307.
Western Union Tel. Co. v. Bullard, 67 Vt. 272.
National Water Works Co. v. Kansas City, 65 Fed Rep. 691, at 694 and 695.
Norfolk & W. R'y Co. v. Purdue, 40 W.Va. 442.
Southern Marble Co. v. Darnell, 94 Ga. 231.
McBroom v. Thompson, 25 Or. 559.
Clark v. Glidden, 60 Vt. 702.
Morton Brewing Co. v. Morton, 47 N. J. Eq., 158, at 162 et seq.
Nowlin v. Whipple, 120 Ind. 596.
Saucer v. Kellar, 129 Ind. 475.

Some cases are cited which are supposed by complainant's counsel to settle the doctrine in relation to estoppel contrary to what we have claimed. The only cases that we think require notice are the following:

De Mill v. Moffat, 49 Mich. 126.

This was an action of ejectment. Plaintiffs claimed as heirs of John Thorn, deceased. Defendant claimed under a deed from Thorn to one Hamilton, which was lost, and evidence was given of its execution, and the verdict was based on proof of such deed. Plaintiffs claimed an estoppel because Hamilton, while administrator of Thorn's estate, had sometimes described the property as belonging to the estate. There was no evidence that the situation of the plaintiffs had been in any way affected by his having referred to the lots as belonging to the estate. It was therefore said that there was no case made even for an equitable estoppel, and even if an equitable estoppel had been shown, under the authority of *Hayes v. Livingston* it would not be a defense in an action of law.

Nims v. Sherman, 43 Mich. 45.

This was a case of summary proceedings to obtain possession. Plaintiff claimed under a foreclosure sale, which was ineffectual because the holder of the title was not made a party. The defendant claimed under a deed from the owner of the legal title. Plaintiff claimed an estoppel against the defendant because, before he bought, defendant had told him he was going to leave the land after he had harvested his wheat and that he made no claim under the deed. The case showed that the expressed intention of the defendant to leave the land depended on certain conditions, and that there was not enough to raise an equitable estoppel, and certainly not enough to transfer the legal title under which alone the plaintiff could recover in that case.

First National Bank of Kalamazoo v. McAllister, 46 Mich. 398.

This was a suit in equity in aid of execution. McAllister bought a lot and took conveyance to himself. Afterwards, wishing to transfer it to his wife, he took another deed from the grantor directly to his wife without reconveying. Here the legal title was certainly in McAllister, but this being a suit in equity it was held that there was no equity in favor of the complainant and that the court would regard the title as having passed to Mrs. McAllister. McAllister by his act had placed himself in a position where he was estopped in equity from claiming the title, and his creditors could claim no more rights in that respect than he could. This was certainly a case where a court of equity recognized the transfer of a title by estoppel.

Shaw v. Chambers, 48 Mich. 355.

Chambers brought ejectment and Shaw filed a bill

to enjoin the prosecution of the suit, alleging an estoppel because the plaintiff in ejectment had told him before he bought that he and his co-heirs had found they could not hold the property. He was only one of a large number of heirs. After this he bought the interests of all others. Complainant by his bill showed a complete legal title and it was held he had a good defense in the ejectment suit and there were no grounds for equitable jurisdiction. Defendant, however, claimed, if he should not be able to make a good title at law, he ought to be relieved on account of the equitable estoppel and a court of equity had jurisdiction for that purpose. The court says (p. 359): "To this suggestion it is answered that estoppel in pais cannot be admitted to overthrow a title to land (citing cases). This is true as a general rule; spoken words cannot be received as a substitute for the formal conveyance which the statute of frauds requires. Cases of doubtful and disputed claims, and cases where the facts are not of record and not readily accessible, may present exceptions. *Brant v. Virginia Coal Co.*, 93 U. S. 326. But one fatal objection to the supposed estoppel is as good as many, and in this case it is enough to say it fails on the evidence. Jones does not pretend to have sought information from any brother or sister of Enoch N. Chambers except the defendant, and as a man of sense he must have known that what one of several supposed heirs might say could bind the interest of nobody but himself. But defendant denies the statements imputed to him; and we have word against word, with quite as much circumstantial support for the denial as for the assertion. The supposed estoppel may therefore be dismissed from consideration."

In this case the court expressly recognize that there are cases where spoken words will operate as an estop-

pel in equity, but that no case for estoppel is made by the evidence and therefore the question is not decided, but dismissed from consideration.

John Hancock Insurance Co. v. Dick, 72 N. W. Rep. 179.

This was a bill filed to cancel an insurance policy and in this case as well as the cases cited, the only question discussed were whether equity had jurisdiction, or whether there was an adequate remedy at law.

Brewer v. Boston & Winchester R. R. Co., 5 Metcalf 479.

It was said by the court in this case that it did not appear that the declarations of the demandant were made to tenant's agent with a view to influence their conduct, or that he had knowledge of their intention to purchase. This case, as well as that of *Proctor v. Putnam Machine Co.*, referred to therein, was an action at law, and the decision of the court was made with reference to the legal title.

Brant v. Virginia Coal and Iron Co., 93 U. S. 326.

In this case there were no representations that the title was other than what it actually was. There were no facts on which an estoppel could possibly be predicated. In discussing the question of estoppel generally Mr. Justice Field, in relation to the question of fraud, says (p. 336): "The element of fraud is essential either in the intention of the party estopped *or in the effect of the evidence which he attempts to set up.*" And further: "There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct in which the presence of fraud, actual or constructive, is wanting; as where one of two innocent parties must suffer from

the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has received the profits of a transaction he is not permitted to deny its validity while retaining its benefits."

Here we have exactly the case supposed. The complainant, rather than question the correctness of *Clute v. Fisher*, and incur the expense and delay of such action, and for the purpose of inducing the defendants to join in the drainage of the lake, which it greatly desired, agreed to the boundary lines, obtained the desired action of the defendants and now, while retaining the benefits, seeks to deny the validity of the arrangement. The fraud consists "in the effect of the evidence" it now "attempts to set up".

Ignorance of title does not necessarily relieve a party from the consequences of his acts and representations.

1 Story, Eq. Juris., Secs. 387 and 388.
Henshaw v. Bissell, 18 Wall. 271.

In this case it is said by the court: "There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights."

See Pomeroy, Eq. Juris., Secs. 803, 804.

In the case of *Boardman v. Ry. Co.*, 84 N. Y. 182, the court, Miller, J. after quoting the rule as stated by Lord Denman in *Pickard v. Sears*, cited by plaintiff's counsel, says: "Nor is it essential to an equitable estoppel that the party should design to mislead and it is sufficient if his acts were calculated to mislead and have misled another acting under them in good faith and exercising reasonable care."

It is urged in the state court, that the defendants knew, or had as good opportunities to know, the facts, the state of the title, and the respective rights of the

parties, as the plaintiff, and that therefore they could not have been misled by any representations on the part of the plaintiff.

The defendants undoubtedly were bound to know the law of riparian proprietorship to the same extent as the plaintiff. It was a matter upon which, according to the plaintiff's testimony, there had been some question raised. The case of the rule announced in *Clute v. Fisher* was supposed by some to be the law, and by others not. The time came when it was necessary to resolve all doubts on that question and determine what should be regarded as the boundary line as between these parties. The representations upon which the defendants relied, being made by the statement of the title set forth in the Ishpeming city ordinance, and also practically in the contract itself, and by the acts and conduct of the plaintiff, both before and since, and upon which they made these large expenditures of money, were not representations as to the facts, or the rights of the parties, but representations that the plaintiff *abandoned all claim to any part of the bed of the lake north of the section line.* The vital question at that time, and that on which the defendants acted, was not what, after a contest, would the courts decide as to the rights of the parties, but *what did the parties now agree* were their rights, and what claim of rights did the plaintiff agree to abandon, or represent that it did abandon?

Doubtless the acts, agreements and representations of the plaintiff in that regard were made in good faith, without any expectation of ever changing its attitude on that subject. There was no fraud in making the representations and the agreement; but to allow the plaintiff now, after all that has been done under the arrangement, the representations, and the acts, upon

which the defendants relied, to repudiate that contract, would result in an unconscionable fraud upon the defendants.

Plaintiff's counsel, on page 59 of their brief, urge that the plaintiff acquiesced in the rule of *Clute v. Fisher* under compulsion, and could not be estopped thereby. They assert, in effect, that the rule there announced was the *law of the state*, until it was changed in 1896, and that the plaintiff, as a law-abiding citizen could not do otherwise than conform its conduct to it.

If this was so, then the settlement made by the parties was exactly in accordance with their legal rights at the time. The change of the law could not affect rights already vested.

But of course the dictum in *Clute v. Fisher* never was the law in Michigan.

The plaintiff might have asserted its rights in the lake bed to the center, or middle line, and appealed to the courts in support of them, if it had seen fit. Instead, it considered it more advantageous to have an immediate settlement and determination of its boundaries, so as to secure the valuable ore deposits it had found, and to enable it to work them without the delay attending litigation. After having obtained the benefits of the speedy settlement, it cannot now claim a re-adjustment of the boundary lines.

IV.

If the parties had not already apportioned the lake bed among themselves, and established their boundaries, the court, if it had jurisdiction to make such apportionment, could not do so by lines converging to a common center but must make such division by lines running to the middle line or thread of the lake.

That riparian owners in Michigan, whose land is bounded by a stream own to the middle line of the river, is thoroughly settled by the decisions of the courts of that state.

> Webber v. Boom Co., 62 Mich. 626, at 636 and cases there cited.

It is also well settled that irregularities in the banks of the river do not interfere with the rule. If the river is straight and of uniform width, the middle line will be parallel with the banks, and the lines of proprietorship will extend into the stream at right angles with the banks as well as with the middle line. If there are bends, bays or other irregularities in the river the lines will vary from a right angle with the banks, but will nevertheless be drawn at right angles with the midle line.

In *Clark v. Campau*, 19 Mich. 328, the rule is stated as follows: "Where the stream is straight, the water front will be bounded by lines drawn at right angles with the thread of the stream, protracted until they reach the end of the shore line. When the stream curves, the same principle applies, and the lines running from the shore would converge or separate, according as the land lay within or without the curve."

In *Bay City Gas Light Co. v. Industrial Works*, 28

Mich. 182, the question is more fully discussed, and the rule of *Clark v. Campau* is affirmed. "Any other rule" says the court (p. 183), "would subject riparian owners to have their entire access to the stream, and all their docking privileges cut off, whenever the local curve of the shore should be such that a line drawn at right angles with their neighbor's shore line would cross in front of them—a result which would be inevitable where the shore is not altogether straight and parallel with the middle of the stream. * * * If the bounds are all to be governed by lines drawn at right angles from the thread to the shore *termini*, as near an approach will be made to an unvarying measurement as is possible under any ordinary circumstances." And it is further said that "*no other rule* has ever been suggested which will give every proprietor his title to the thread of the stream; and as held in *Clark v. Campau*, we regard this rule as *settled* and reasonable" (page 185).

A different rule is suggested on behalf of the plaintiff in this case, and it needs but a glance at the map to show that the lines under the proposed rule, if adopted, would have precisely the effect above stated and "subject riparian owners to have their entire access to the stream cut off."

In the New England states, in Illinois, Wisconsin, Iowa and some other states, the law is held to be that riparian ownership on the shores of inland lakes stops at the water's edge. In New York, New Jersey, Ohio, Michigan, Minnesota, Kentucky, and some other states the law is held to be, as above stated, that riparian ownership on the shore of non-navigable lakes extends to the middle line of the lake.

There is little or no diversity in regard to riparian ownership as applied to rivers, and especially as to non-

navigable rivers, that the ownership extends to the middle thread of the stream.

In those states in which the rule is extended and made applicable to non-navigable lakes, the authorities place it upon the ground that there is no difference in principle between the case of rivers and lakes, and that the rule which is applied to one applies also to the other; that is to say, *that the rule which has been made applicable to rivers should be and is made applicable to lakes.*

The distinct principle is that ownership of the shore carries ownership to the *middle line* of the water in front of the shore.

The distinction between a river and a lake is that in one case there is a current, and in the other no current properly so called. In one case there is always length which is greater than the width, in the other case the body of water is sometimes substantially in that respect like a river, and sometimes it is nearly circular.

In each case the question is the same, viz: What is the portion of the body of water, and of the land under it, in front of the land on the shore, which belongs to the owner of the shore?

The riparian right arises because the ownership of the shore has attached to it the immediate adjoining part of the body of water in front of it, and extending out to the middle line of that water.

Such ownership does not depend upon the question whether the body of water is navigable or not navigable, deep or shallow, and it does not depend upon the form of the body of water.

It exists, because, by the conveyance of the land upon the shore, the portion of the body of water lying in front of the land is by the same instrument conveyed as far out as the middle line of the water.

Richardson v. Prentiss, 48 Mich., at 91 and 92.
Turner v. Holland, 65 Mich. at 466.

It is recognized in the cases that difficulties arise in determining the boundary lines in the case of lakes, but it is also recognized that difficulties of the same character arise both in the case of rivers and lakes.

The authorities while applying the rule where the form of the river permits of its application, also state that, owing to the bends, bays, indentations, and conditions of the river in particular cases, a modification of the rule may be required.

As the principle in the case of lakes is the same as in the case of rivers, and the objects sought are the same, the rule applied in the case of rivers will be applied to lakes where in a particular instance the form of the lake permits of the application, and the rule will be modified when the object sought requires the modification of the rule.

In *Rice v. Ruddiman*, 10 Mich. 125, Christiancy, J. stating that the only question involved was whether the *locus in quo* belonged to the riparian proprietor, said: "But if the water continues so shallow as to render the lands under it susceptible of beneficial private use to the *center line* of this narrow lake, then I have no hesitation in saying I think the riparian ownership extends to such center line" (p. 139). He further says that the lines would not necessarily extend into the lake in the direction of the side lines of the tract; that would depend on the shape of the lake and the relative rights of the owners; and adds: "When the question arises between adjoining owners, it will not be found difficult of decision within the principle of adjudged cases". The "adjudged cases" which established the principle under which the decision was made, and were referred to, were those

which related to rivers, such as *Lorman v. Benson* and other similar cases.

Manning, J., does not think the center should be taken for the boundary in our great lakes, like Lake Michigan, but as applied to an inland lake he does not dissent from the opinion of Justice Christiancy.

Justice Campbell says (p. 146): "I concur entirely in the views of my brother Christiancy"; and on page 147 he says "wherever use can be made of the bed of the water, in improvements near the shore, in waters not governed by the artificial common law rules of tide water ownership, I think the rules applicable to fresh water rivers are more reasonable and just, and are certainly more conformable to the common understanding and usage."

Justice Martin (p. 147), also concurs fully in the views of Justice Christiancy, and says the rights of riparian proprietors on our interior lakes "are the same as those of proprietors upon our navigable streams".

In *Richardson v. Prentiss*, 48 Mich. 88, the authorities are reviewed, which settle the rule in this state that a conveyance of land bounded by a water course carries the title to the bed of the stream *ad medium filum aquae*, in the absence of a contrary intention expressed in the conveyance; and the court, Marston, J., says: "In this state, whatever the law may be elsewhere, these same principles have been applied to lands fronting on the lakes."

In *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, the rights of riparian owners on Pere Marquette Lake were under consideration. The court, Champlin J., says: "It is the settled rule in this state that the title of the riparian owner extends to the middle line of the *lake or stream* of the inland water (citing the foregoing and other cases). This has become *a rule of property* in

this state, and the supreme court recognizes the right of each state to determine the doctrine for itself." (Citing *Barney v. Keokuk*, 94 U. S. 324.)

In the case of *Clute v. Fisher*, 65 Mich. 48, it was said that, "in case of a body of water so large that the lines of the sections or subdivisions of section held by the proprietors of the land adjoining or surrounding said lake, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said lake in accordance with the rule laid down by Justice Campbell in *Lincoln v. Davis*, 53 Mich. 390.

The case of *Hardin v. Jordan*, 140 U. S. 381, related to the ownership of the bed of a lake some two or three miles in length and very irregular in shape. The question to be decided is stated by the court as follows (p. 372). "The lake is two or three miles in extent, and the main question in the cause is whether the title of the riparian owner on such a lake extends to the center of the lake, or stops at the water's edge."

The court holds, Justice Bradley delivering the opinion of the majority, that this question must be decided by the local law of the state of Illinois. After stating that, in the judgment of the court, the law of Illinois in respect to this question of riparian ownership is the common law and nothing else (p. 385), the question in regard to the title of fresh water lakes and ponds is elaborately examined. In discussing the common law rule, the court quotes from the decision of Lord Selborne on the question as applied to lakes in Scotland, as follows: "If there are more riparian proprietors than one, it belongs ratably to them all. So far as relates to the solum or fundus of the lake, it is considered to belong in severalty to the several riparian proprietors if more than one; the space enclosed by lines

drawn from the boundaries of each property *usque ad medium filum aquae* being deemed appurtenant to the land of that proprietor exactly as in the common case of a river." It is held that the common law rule is the same as laid down by the judge in the Scotch case.

The conclusion upon this point is thus stated on page 391: "When land is bounded by a lake or pond of water, the water equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value and enters largely into the consideration for acquiring it. Hence the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water. Besides, a lake or pond, like a river, is a concrete object, a unit, and when named as a boundary the natural inference is that the middle line of it is intended, that is, the line equidistant from the land on either side."

Referring to the decision of Judge Gresham in the *State of Indiana v. Milk*, 11 Fed. R. 389, after quoting the argument used in that case against applying the river rule to lakes on account of the difficulties of applying it owing to the irregularities of the banks, etc., Justice Bradley says (pp. 397, 398): "We do not think this argument *ab convenienti* is sufficient to justify the abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say, we think the common law might be improved, and we will therefore improve it. As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bot-

toms or flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom and along its sides, and the use of converging lines would only be required at its two ends." The justice then refers to the case of *Clute v. Fisher* and also to that of *Stoner v. Rice*, 121 Ind. 51, in which the rule of *Clute v. Fisher* is adopted, and in relation to them, says (p. 399): "This method of disposing of the subject might be convenient and attended with some advantages if it were sanctioned by the law; but we do not see any greater reason for adopting this departure from the common law than that followed in the case of the *State of Indiana v. Milk*, before referred to."

The case of *Ledyard v. Ten Eyck*, (36 Barb. 102), cited in the case of *Hardin v. Jordan*, relates to riparian rights of an owner to a parcel of land lying at the *side and end* of Casnovia Lake in the State of New York, which lake is five miles long and three-quarters of a mile in width. The rule applied in that case was that the riparian owner holds to the middle line of the lake.

Gouverneur v. National Ice Company, 134 N. Y. 355, decided in 1892, lays down the rule as finally settled in the State of New York relating to riparian ownership upon non-navigable lakes. It is there held that the rule applicable to rivers applies to lakes. The lake in that case was about one hundred and fifty-one rods in length, and in the broadest place about forty-eight rods in width, and covered about forty-five acres. The opinion, which is concurred in by all the justices of the

court of appeals, contains the following (p. 868): "While a lake may be of such form as to render the designation in it of the lines of the several riparian owners, in certain cases, somewhat difficult, that fact in its relation to the practical effect of the rule is not an objection to its general application. No case will probably arise in which their respective rights in that respect may not be ascertained and defined in reference to the location and extent of the boundaries of the lands on or along the lake Bends or bays in rivers may in some instance present like difficulties. The value, such as they have, of small non-navigable lakes and ponds, as a general rule, is mostly in their relation to the adjacent lands."

Lamprey v. Metcalf, 53 N. W. 1139, (52 Minnesota 181), relates to riparian ownership upon a meandered lake comprising about three hundred acres. In this case, the opinion states the question to be as follows (p. 1140): "What rights in or to the soil under the water does the patentee of land bounded by a meandered inland lake acquire by his patent?" After reviewing authorities, the decision is that the right of riparian ownership applicable to rivers applies also to inland lakes. The court says (p. 1142): "The only reasons we have ever seen suggested for a distinction are, *first*, the supposed difficulty of running the lines between adjoining riparian owners of lands bordering on lakes, and *second*, the supposed injustice that might result in some cases in giving the owner of a very small estate on the shore of a lake a very large reliction in front of it. But it seems to us that neither of these are adequate reasons for departing from a well settled principle. Both of them are more imaginary than real, and would occur only in exceptional or extreme cases, and are almost as likely to occur in the

case of riparian ownership on a tortuous river, with an ill defined or changeable channel, as in the case of such ownership on the borders of a lake. The owner of a mere 'rim' on the bank of a river may sometimes acquire an accretion or reliction much larger than the parent estate, but that is incident to all riparian ownership; and it was never suggested in the case of a stream that such a state of facts furnished any reason for making the case the exception to the general rule."

Lembeck v. Nye, 47 Ohio St. 336, decided by the supreme court of Ohio in 1890, relates to riparian rights on Chippewa Lake, situated in Ohio, having an area of four hundred acres, oval in form its length from north to south being about twice as great as its length from east to west. After stating the rule in Ohio with reference to streams, which is identical with the rule in this state, and referring to the conflict of authorities as to the rule in relation to inland lakes, the court says, "In this state, where the rule is so firmly established that a boundary on a running stream carries the land to the middle or thread thereof, principles of analogy afford grounds for applying it to non-navigable lakes. The main reason for the rule in one case applies equally to the other. The existence of 'strips or gores' of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are 'strips and gores' of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable and alike vexatious in each of the cases, and that public policy which would seek to prevent them by a construction that would carry the title to the center of the highway, running stream, or non-navigable lake that may be made a boundary of the

lands conveyed, applies indifferently and with equal force to all of them. * * * That practical difficulties in the application of the rule may arise where the lake is so nearly round that it cannot be said to have any length as distinguishable from its breadth, or when the side lines of the respective parcels of land bounding on the lake approach it in such a direction that if they should be extended to the center thereof they would cross each other, is apparent. The latter difficulty is not at all unusual in the case of lands bounding on running streams, but does not prevent the application of the rule. *3 Washb. Real Prop.* 459, star note. Ang. Water courses, section 55, where the subject is learnedly discussed by those able authors, and this difficulty overcome."

The court further says that if there are non-navigable lakes within the state of such shape that no length can be affirmed of them, other appropriate rules must be adopted, which, in the light of all the circumstances, may be regarded as affectuating the intention of the parties, and are consistent with public policy, but that no difficulties arise in that case for "Chippewa lake is distinctly longer than it is wide and a prolongation to its center of the side lines of the respective parcels lying along its sides will not cause them to cross each other. The rule, of course, excludes those lands which merely touch the end of the lake and do not at all extend along its sides."

This case clearly holds that where a lake is of such form that it has a middle line, the same rule applies for determining the boundaries of adjoining owners as is applied in determining the boundaries of owners bordering on a stream.

Ridgway v. Ludlow, 58 Indiana, 248 (decided in 1877), relates to a lake situated in Indiana, similar in form to

Lake Angeline. The portion of the lake in dispute lay within the line of the south half of the section.

In deciding this case, the court uses the following language (p. 252): "The following questions of law are made in the case, and must be settled:

"1. Is the owner of the lands bordering on the margin of a non-navigable lake, by virtue of such ownership, also the owner of the land extending under the water, to the thread or a line along the middle of the lake?

"2. If such title to land, on the margin of such lake is acquired by twenty-five years' adverse possession and use, under the statute of limitation, will such title affect the ownership of such land under the water to the thread or middle of the lake?

"1 The first question, as to non-navigable rivers in the state of Indiana, is settled in the affirmative in the case of *Ross v. Faust*, 54 Ind. 471, and we can see no difference in principle in this rule, whether applied to non-navigable rivers or non-navigable lakes, when they are within the congressional surveys. In this view, we are directly supported by the case of *Rice v. Ruddiman*, 10 Mich. 125.

"'*Forsyth v. Sneal*, 7 Biss. 201, decided by Judge Drummond, in 1876, holds that a riparian owner on a lake two miles long and about three-fourths of a mile wide, has the same rights in the lake bed as a riparian owner has in the bed of a non-navigable river.

"The case of *Grand Rapids Ice and Coal Co. v. Ice and Coal Co.*, 102 Mich. 227, was decided in accordance with the same principle of division of the lake bed among the riparian proprietors and with reference to the middle line. The defendants had cut ice from the lake in front of their premises, which had a small frontage on or near the southwest corner of the lake and within the boundary lines of the plaintiff. if they

could be extended into the waters of the lake so as to fill out the sub-division of land which the plaintiff owned. The circuit court, in the finding of facts, stated that the defendant "entered upon the ice in front of the lands so leased and owned by it and cut and removed the ice in front of said lands and between the shore and the middle of the lake between lines which would be formed by running them at right angles from the center line of said lake to the shore line so that the defendant would have the same proportionate share of the center line of the waters of the lake as they have of the whole shore line on the south side of said lake."

It was nowhere stated on what part of this space bounded by the defendant's water frontage the middle line of the lake and the side lines, the ice was cut. The defense is based upon the proposition that the defendant was entitled to cut ice anywhere within the area mentioned, and that was the question before the court.

The rule of law is reiterated by the court in that case (p. 236) as follows: "Unless the contrary appear, a grant of land bounded by a water course conveys riparian rights (*Richardson v. Peters*, 48 Mich. 88); and the title of the riparian owner extends to the middle line of the lake or stream, of the inland waters. *Weber v. Boom Co.*, 62 Mich. 626, and cases cited at page 636)". The court also says: "That a lake may be of such form as to render the designation in it of the boundary of the several riparian owners somewhat difficult, is not an objection to the application of the rule".

But it is claimed by counsel for the plaintiff that the division of this lake by the middle line is impracticable, and that it must be divided by a decree in the

nature of a decree of partition, as if the riparian proprietors were tenants in common of the bed of the lake, and it is assumed that they should have the same proportion of the lake bed that they have of the water frontage of the entire lake and that in doing so a point which they call an "equitable center" must be taken, so that straight lines drawn from the shore at the point of intersection with the lines of proprietorship to this "equitable center" will divide the bed of the lake among the several riparian proprietors in that proportion.

In attempting to support this proposition the language of Mr. Justice Campbell, in the case of *Lincoln v. Davis* and *Jones v. Lee*, is cited.

The case of *Lincoln v. Davis*, related to riparian rights under the waters of Thunder Bay on Lake Huron. The language used is with reference to the large bodies of navigable waters of that kind. As a preface to the portion of the opinion quoted by counsel in their brief (p. 14) Mr. Justice Campbell, after stating that riparian rights existed, says, "But there are two difficulties in the way of defining these rights on our large lakes as they might be and are defined in the narrower waters connecting the lakes. One is the impossibility of defining boundaries where there is no *filum aquae*' and the other is the public character of the waters, which gives the state a much larger control than over strictly private waters". The irregularity of shape of the lake, Mr. Justice Campbell says, *prevents drawing lines to a common center.* In such case lines drawn to a common center must of necessity cut off some portions of the frontage, either almost or entirely from access to the water, as the lines drawn by counsel in this case do in several places.

In this case counsel seeks to divide the *entire area* of

the lake in proportion to the *entire shore frontage* of each proprietor, although a considerable part of the frontage of the plaintiff, which goes to make up its proportion, fronts on an arm or branch of the lake and not upon the main body of the lake at all. This arm or branch is on the south side of the eastern part of the lake, and the rule which plaintiff's counsel attempt to apply necessitates the taking of a considerable area over in the western part of the lake and so diminishing the proportion of the Lake Superior Iron Company, on account of this frontage on the arm of the lake in the eastern part.

The lines proposed by counsel, if adopted, would have the effect stated by Mr. Justice Campbell in the case of *Bay City Gas Light Company v. Industrial Works*, (supra) to exclude the owner of certain portions of the land from any water rights whatever.

If the rule is a good one it should be applicable, no matter how many riparian owners there are. It should be a rule under which the entire lake bed could be so divided that each subdivision fronting on the lake would have its proper proportion of the lake bed. Take the map (Exhibit F) upon which plaintiff's counsel draw their proposed partition lines. Draw lines from the intersection of each subdivision line to that same "equitable center" and it will be found that in several places a considerable stretch of land is left almost entirely without any portion of the lake bed. The line drawn from the southwest part of the lake to the "equitable center" it will be seen, leaves but a narrow strip of lake bed appurtenant to the shore on the north side in that part of the lake, and a strip about three times that width appurtenant to the plaintiff's land on the south shore. The line drawn from the east shore of the southeast arm of the lake to the "equitable cen-

ter" cuts off considerable of the shore of an adjoining proprietor entirely from the water, while the lines drawn from the eastern and western extremities of lot six on the south shore rapidly converge to a point leaving the claimed proprietorship of the plaintiff drawn to the line extended in front of the whole of said lot number six.

A better illustration of the mischief of attempting to adopt any other rule than the center line, as stated by Justice Campbell, in the Bay City Gas Light Company case, could not well be imagined.

The case of *Jones v. Lee*, related to the boundary between adjoining riparian proprietors on a bay in the east end of Muskegon Lake. This also was said to be a body of water deep and navigable, and that no beneficial use of the bed of the lake could be made, except near the shore; that the lake being navigable, riparian rights must be confined with reference to the paramount rights of navigation, and it was said that that depended upon principles which apply where immediate dependence upon the *filum aquae* is impracticable. It was said that if the whole body could be divided between the riparian proprietors it must be done by some rule of proportion. There was an entire absence of evidence in the case by which the court could determine the boundaries in the lake bed of the parties to the suit. It was found that the result of the judgment below was to extend the plaintiff's boundary lines in front of the defendant's property so as to practically exclude the defendant from any beneficial use of his water front and therefore the judgment was reversed.

It was not suggested, either in this case, or in the case of *Lincoln v. Davis*, that the boundary lines should be drawn to some common center. If a lake were exactly circular there of course could be no

middle line, it would be a point. But where a lake is distinctly longer in one direction than in the other there can always be, and there must always be, a middle line, and lines from the extremities of riparian proprietorships can be run to that line and, as said by the court in the case of *Hardin v. Jordan*, converging lines will be required only at the ends.

Plaintiff's counsel in presenting the case before the Michigan Supreme Court, conceded that the rule they had suggested could not be sustained, and that it would be more equitable to cut off the arms of the lake, leaving a body of water nearly circular, and then dividing the bed of the arms of the lake with reference to the *filum aquae*, and the body of the lake by lines converging to a common center (see opinion, Record p. 256). But in that case there would be three portions of the circle without any land fronting thereon, and those portions would not be appurtenant to any land.

We are not cited to any case where a division by drawing lines to a common center has been made, and we think no such case can be found.

Practically the same difficulties that exist in this case might and often do arise in the case of rivers. A river flowing from east to west might widen out and form exactly such a shaped body of water as we have in this case. A branch flowing into the main stream from the south might form a body of water exactly like the south arm of this lake. There could be no question but that in such case the middle line would be drawn through the center of the lake, and then a middle line in the branch would be drawn from the south to intersect the main center line at some point. The practical difficulties, as said by the court in numerous cases, would not prevent the application of the rule. We think, however, that these practical difficulties may

be taken into account as bearing upon the question whether the parties themselves haven't made a division of the lake bed, and whether that division so made ought not to be considered final.

Some of the remarks of counsel in their brief seem to indicate that they understand that the meander lines should be taken as the water front, and that the division of the lake bed, together with the upland inside the meander lines should be based upon the meander lines, the entire area within those lines to be considered the same as a part of the lake.

This, clearly, is not correct. The meander lines are made for the purpose of determining, not the boundary lines of the parcels of land conveyed by the government, but the quantity of land in the parcel conveyed by the government for which the government price of the land is charged.

> Railroad Co. v. Schurmeir, 7 Wall. 272.
> Hardin v. Jordan, 140 U. S., at 380, 381.
> G. R. & I. R. R. Co. v. Butler, 159 U. S., at 93.
> Lamprey v. Metcalf, 53 N. W. Rep., at 1140.
> Palmer v. Dodd, 64 Mich. 474, 475.

The plaintiff's map showing meandered lines is offered as a map of the lake, but, as testified to by the draftsman who made it, it was made by projecting the meander lines on paper, and not by a survey on the ground.

Two maps in evidence show the actual shore lines of lake and how the meander lines differ from them. We refer to defendant's exhibit 2a at page 164 of the Record, and defendant's exhibit 28, at page 218 of the Record.

The testimony of Mr. Cummings shows in detail how he arrived at the shore line, and from this, and the photographs, it will be seen that there was no difficulty in determining that line with practical accuracy.

It appears that the meander line at its point of intersection with the north and south center line of section ten north of the lake, was 300 feet north of the shore line and at a perpendicular height of 60 feet above. The rule of partition claimed by the complainant classes all that area north of the lake and within the meander lines as lake bed.

In conclusion we submit:

1st. That the writ of error should be dismissed, because

a. There is no Federal question in the case.

b. Neither the claim now made, or any other claim, under any law of the United States, was made before the Supreme Court of Michigan.

c. The Michigan Supreme Court did not decide adversely to the claims now made under the laws of the United States.

d. The decision of the question so raised was entirely unnecessary to the decision of the case.

e. The decision of the case by the Michigan Supreme Court, was based on grounds entirely independent of the alleged Federal question, which were sufficient to dispose of the case.

2d. That if the jurisdiction can be sustained, the claim made under the laws of the United States is obviously contrary to the law as settled by the decisions of this court, and has no color of ground to rest upon.

3d. That the parties by binding agreement, as well as by acts which constitute an estoppel, have themselves parceled out the territory in question, and fixed their boundary lines, and nothing remains for the court to do. The bill should be dismissed.

4th. If the territory were to be re-apportioned, it could not be lawfully or equitably done by drawing boundary lines to a common center.

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